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THE SOCIETY OF COMPARATIVE LEGISLATION

BY

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"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations"

SAMUEL JOHNSON.

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BY

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A general and concise work is distinguished by its
authoritative and accurate treatment of subjects; and
it is not only a valuable reference work, but also a
most interesting and instructive study.

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ENEMY LEGISLATION AND JUDGMENTS IN DENMARK

[Contributed by MISS MARGOT SATZ, *cand. jur. Copenhagen. Diploma in Comparative Law, Cambridge.*]

EARLY in the morning of April 9, 1940, German troops occupied Denmark and, resistance being hopeless, Denmark capitulated. The Government however, did not resign, though the army of occupation established its headquarters in Copenhagen. The only change in the Government—a Labour Government—was that six new Ministers without portfolio were appointed. These six Ministers represented the two other large parties in Denmark, the Conservatives and the Left-Wing (farmers). No general agreement was made between Denmark and Germany concerning the occupation, but several special arrangements were made as to censorship, as to severe punishments for certain acts done against the occupying Power and other matters. Thus Denmark had only Germany's unilateral promise to respect the independence of Denmark and its right to regulate its internal affairs. Further, Denmark had to accept thirteen clauses, by which Germany secured the occupation. Further reconstruction of the Government took place under pressure from Germany in July, 1940 and November, 1942.

On August 9, 1943, the situation became critical owing to numerous acts of sabotage throughout the country. The Germans made the King of Denmark a German prisoner of war and the Government had to resign. No other Government was appointed, but the Directors of the Government Departments retained their posts and exercised their functions until the termination of the occupation.

From these preliminary remarks it will be seen that Denmark never had a German Government nor a Quisling Government, and the whole situation in Denmark therefore differed from that in other countries occupied by the Germans. Consequently, no Statutes and Orders made during the occupation have been repealed merely on the ground that they dated from the period of the occupation. For the same reason no distinction is made between Statutes and Orders belonging to the period of the occupation and others. But the phrase temporary set was very often used in the case of the former.

Sale of Goods.—In order to obtain the discharge of a contract for reasons connected with the war or the occupation, the plaintiff must prove mistake somewhat akin to the English "frustration." Very few judgments on this question have been given.

As regards international sale of goods, attention must be drawn to the following case, which has not yet been reported. Before the war, a British firm ordered several ships from a Danish firm of shipbuilders, Burmeister and Wain. The ships were only half completed when the Germans occupied Denmark. The Germans demanded that the ships should be finished and handed over to them, and this demand was complied with after Burmeister and Wain had consulted the Danish Government. Later on the ships were sunk off the Dutch coast. After the war the British buyers sued Burmeister and Wain for specific performance or damages. In October, 1947, judgment was given by the Maritime Court against the British buyers on the ground that the British buyers would recover compensation from Germany when the conditions of peace between the United Kingdom and Germany are settled. This judgment is believed to be under appeal.

Insurance.—Many contracts of insurance contained "exceptions clauses," according to which damage due to certain causes is not covered by the insurance contract¹, for instance, perils of war, which means that damage caused by war

¹ UfR. 1946. 1238H: a solicitor had a life-insurance contract on his own life, but not covering death due to war, etc. On February 3, 1944, he was killed by terrorists and his family were unable to recover their loss from the insurance company.

UfR. 1947. 115H: A house was insured against fire, but the insurance did not cover damage due to war. The Germans occupied the house and in 1944 it was burned down, nobody being able to prove the cause. The insurance company was held to be not liable.

will not be made good by the insurance company. Several cases involving loss by fire due to sabotage have been brought before the courts for decision, but it was laid down (UfR 1944.951) that an insurance company is not liable for damage caused by sabotage if the policy contains a clause excluding perils of war.

During the recent war, compulsory insurance of registered ships and buildings was introduced, Statute (183), May 4, 1939. When Denmark was occupied by the Germans the risk was considerably increased and therefore Statute (211), April 29, 1940, provided that the State should be liable for this risk under all contracts made after April 9, 1940. The same rules were applied to goods—Statutes (181) May 4, 1939, (212) April 29, 1940, (651) December 17, 1940.

Most employers are under the obligation to insure their employees against accidents. The insurance usually does not cover sailing and fishing. But Statute (353) June 29, 1940, authorised the Minister of Social Affairs to extend the risk of the insurance companies. Statute (473) December 22, 1939, introduced compulsory war insurance for buildings against the consequences of any violation of neutrality and any measures of protection. The amount of the loss recoverable and the premiums were left to be settled until after the termination of the war. The same provision was made for the insurance of movables, pleasure-craft, forests, plantations, ports, etc. All the above-mentioned insurances expired on March 31, 1946, 12 o'clock midnight, the war being considered as terminated then².

Agency, etc.—No contract of agency or partnership is rendered invalid merely by reason of the war or the occupation, but such contracts are subject to the ordinary rules of mistake (including something like the English doctrine of frustration) and fraudulent misrepresentation.³

During the occupation the Germans frequently seized houses occupied by private persons, who were compelled to quit without any notice. Compensation was awarded to these people by the German Government, but after the war the problem arose in many cases whether, when the Germans had left the house, the tenant was entitled to re-occupy it. In UfR 1946/1310, the Court of Appeal decided that the occupation of the house was only temporary, and the question whether the tenant was entitled to occupy the house again, was to be decided in accordance with the ordinary rules applicable between landlord and tenant.⁴

Employment.—If a contract of employment is interrupted after the employee has entered upon the service without any fault on his part, no action lies for non-performance. It is generally assumed in Danish law that either party under a contract of service is entitled to withdraw from it if he can show some good cause, even if the agreed period of service has not expired, and many contracts contain a *force majeure* clause. There are a number of judgments in which it was necessary to decide whether conditions prevailing on and after April 9, 1940, were to be considered as *force majeure* or not: for instance, in UfR 1941/475 H: an orchestra conductor who was dismissed without notice on April 11, 1940, as a result of serious riots which took place, recovered damages: of UfR 1940/1113 and 1945/1129.

Sale of Wrongfully Seized Property.—If property was seized by the Germans in violation of public international law and was re-sold, the original owner is entitled to have the property returned to him, but if the purchaser acquired the said property in good faith and paid for it, the State will compensate him when

² Henry Ussing: *Enkelte Kontrakter* 1946 (2. edit. 228-29, 273, 320).

³ Henry Ussing: *Aftaler* 1945 (2. edit.) p. 457-81; Viggo Bentzon: *Den danske Arveret* 1931 (3. edit.)

⁴ UfR. 1944/600, 1945. 1175 cmp. 1945. 1171 deal with persons who were arrested by the Germans or the Resistance Movement.

he returns the property to the original owner,⁵ Statute (132) March 30, 1946 ss. 28-33.

Limitation of Actions.—Neither the periods for the performance of contracts nor for the bringing of actions have been prolonged; but a special Statute (240) April 4, 1944, was passed to deal with cases in which one of the parties to the contract was in Denmark or Iceland or Greenland and the other was in another of these territories.

Currency.—The Danish currency was not changed during the occupation, though the value of the Danish "Krone" depreciated on account of the abundance of money, arising from the German demands for the printing of more paper currency. Payment of a debt or the redemption of a mortgage during the occupation is valid and cannot be questioned on the ground of the occupation. No special courts were established for black market offences, etc., and these offences are dealt with by the ordinary courts under the ordinary rules.

Judgments in Denmark are not pronounced in the name of the King or of any other authority and the judges who were in office when the occupation began continued in office.

Political Activity.—Communist associations and communist activity were prohibited by Statute (349) of August 22, 1941, under German pressure, but this statute was repealed by Statute (216) May 7, 1947.

Hostages.—One of the characteristics of the German occupation in Denmark was that actual hostages were not taken, but in place of this practice so-called "expiatory murders" were committed by the occupying Power; that is, Danish citizens—often prominent persons—were arrested and executed as a reprisal for acts of sabotage, killing of Nazis, etc.

It has been assumed throughout that there was no state of war between Denmark and Germany during the occupation, and that even the removal and seizure of the police on August 29, 1944, involved no state of war. The Government has not yet definitely decided this question, but it seems to appear from numerous judgments that there was no state of war.

ENEMY LEGISLATION AND JUDGMENTS IN NORWAY

[Contributed by PETER P. STABELL, ESQ.]

1. During their occupation of Norway, the German authorities and their Norwegian collaborators issued a number of laws, decrees, regulations and other provisions of a legislative character. They consciously and systematically disregarded the rules of International Law regarding the powers of an enemy occupant, and made it necessary for the Norwegian Government in London at an early stage to consider as a matter of legal principle the manner in which the enemy legislation should be dealt with after the re-establishment of lawful conditions in the country. On January 26, 1945, the Norwegian Government issued a provisional Act relating to enemy legislation promulgated in Norway during the occupation. After the liberation this Act was superseded by an Act of September 27, 1946, which on all important points conforms closely to the provisional Act issued in London.

A substantial part of the laws with which we are concerned were flagrant violations of international law, but the majority were within the scope of the authority permitted to the occupant under the Hague Regulations. This is true particularly of a number of decrees relating to such non-political subjects as prices, rationing and public health—subjects which would have to be dealt with by any government.

The Norwegian authorities have made it a first principle in their dealings

⁵ "Juristen" 1947, p. 80: a car seized by the Germans and sold after passing through the hands of a third party, was acquired by a purchaser in good faith. After the war the original owner sued the purchaser for the return of the car. Judgment was given against the original owner and was upheld on appeal.

with the enemy legislation that all such laws cease to be operative on the liberation of the country provided they are not maintained by express enactments of the lawful authorities. The above-mentioned enactment of January 26, 1945 and September 27, 1946, is based on this principle. It is, however, only concerned with the question of the validity of the enemy legislation after the liberation. Its validity during the occupation is a matter for the courts. In the decisions which have been given, the courts have very largely resorted to the Hague Regulations as the appropriate test.

As to the post-liberation effect of enemy legislation, it has been assumed that there is no rule of international law which requires provisions within the scope of the Hague Regulations to be treated as valid until they are formally abrogated, while those which fall outside them are in every respect null and void. Questions concerning the validity of such laws after liberation have been considered a problem of municipal law. The Hague Regulations do not bind the lawful authorities in deciding the effect to be attributed to enemy laws *after* the occupation.

The Norwegian Act on enemy legislation provides in Section 1 that all laws issued during the German occupation shall become inoperative from the date of the liberation:

- (a) when they purported to serve the interests of the occupying power, or must be considered part of Nasjonal Samling's (the Quisling party) attempt to Nazify the country or as an abuse of power by the occupying power or its collaborators,
- (b) when they violate the Constitution,
- (c) when they relate to penalties or seizure.

The Provisional Act of January 26, 1945, which was issued before the liberation, authorised the King in Council (the Government) to determine whether an enemy law was of such a character as to fall under (a) above. It was the purpose of this rule to reduce as much as possible the legal uncertainty which was bound to ensue upon liberation of the country. Pursuant to this provision lists were made of those laws which were to lapse immediately, and these lists were continually brought up to date.

The Provisional Act laid down that enemy laws which did not fall within any of the provisions quoted above under (a), (b) and (c), should remain operative unless otherwise determined by the King in Council (Government). However, all such laws were to lapse at the latest one year after the liberation of the whole country. This provision makes it clear that the Act presupposes that it was necessary expressly to maintain a law dating from the occupation in order that it should not lapse automatically upon liberation.

However, in the Act which was promulgated later (September 27, 1946), the period during which these laws were to remain operative was extended in a number of cases. On January 1, 1948, only three laws dating from the occupation were still in force.

2. In Norway the courts are not subordinated to the Royal Power. The judiciary exercises its functions as an independent power. It follows that during the occupation the Courts were not forced to render judgments in the name of the enemy government. This made it easier for the majority of the Norwegian judges to continue in office. At the conclusion of the war the great majority of them were loyal Norwegians who had been in their positions since long before the war. The important exception to this rule was the Supreme Court. As a protest against the illegal interference with the administration of justice by the German authorities all the judges of the Supreme Court resigned and were replaced by collaborators.

The Germans maintained civil as well as military Courts in Norway and their Norwegian collaborators established new special Courts to try cases where political issues were involved. They did not want to depend on the ordinary

Courts of the country in cases which involved enforcement of the so-called "new order."

The organisation of the old Courts was also tampered with. The traditional jury was abolished and replaced by lay judges (Assesleurs, Schöffén), and new regulations were issued regarding panels for lay judges. The Quisling authorities also abolished all participation of lay judges in cases relating to price control and rationing.

3. On July 29, 1941, the Norwegian Government in London issued a provisional Act relating to the re-opening and revision of judicial and administrative decisions made in Norway during the German occupation. After the liberation this Act was replaced by an Act of November 15, 1946.

Section 6 of the latter Act provides that judgments rendered by German military and civil Courts are null and void as far as Norwegian interests are concerned. And in this context extraordinary Courts established by the Quisling authorities are considered to be in the same category as German Courts. The Act also provides that questions as to which Norwegian Courts fall into this category shall be decided by the Ministry of Justice with conclusive effect.

Section 7 provides that judgments in criminal cases shall be null and void both when made pursuant to provisions of criminal law enacted directly by the Germans and when made pursuant to specified enactments of criminal law issued by the Quisling authorities during the occupation.

The most important provisions, however, are contained in section 9 which gives a convicted person a right to claim the re-opening of a judgment on specified conditions. The understanding is of course that when these conditions or requirements are not satisfied, and also when no such claim is lodged, the judgment shall stand.

Judgments are liable to be re-opened in the following instances:

- (a) If the decision was made directly pursuant to an unlawful enactment issued during the occupation or pursuant to enactments which had as their predominant object to serve the interests of the Occupying Power, excluding those cases where it is apparent that the decision was unaffected thereby.
- (b) If a member of Nasjonal Samling (the Quisling Party) or a person guilty of treason took part in the decision as a judge and there is reason to believe that the decision was affected thereby or if for other reasons it must be considered probable that the decision will be revised.
- (c) If the act which is the subject of the case was committed as part of the opposition against the enemy and for that reason must be considered lawful.
- (d) If the convicted person was prevented by reason of the war from appearing or from producing evidence and there is reason to believe that the decision was affected thereby.
- (e) If there is reason to believe that the decision was influenced by political considerations.

In deciding under (a) whether statutory provisions were unlawful the criterion applicable will be Article 43 of the Hague Regulations and other rules of international law regarding the powers which can legally be exercised by an occupying power.

The Act contains no analogous rule relating to civil law cases. But section 14 provides that civil judgments can be re-opened and revised. The conditions of such re-opening are laid down in the provision referred to and correspond fairly closely to the rules regarding re-opening in criminal cases. The requirements are more exacting, as it is necessary in a civil case to consider also the interests of a second party who may in good faith have settled his affairs in accordance with the judgment which was rendered. The circumstances may call for an assessment of conflicting interests.

Judgments in civil cases are liable to be re-opened in the following instances:

- (a) If the decision is made directly pursuant to an unlawful enactment issued during the occupation, and maintaining it would involve approval of the unlawful purpose of the enactment.
- (b) The same as (b) above.
- (c) The same as (d) above except that "If one party" is substituted for "If the convicted person."
- (d) The same as (e) above.

The same act also provides (section 22) that a party who has refrained during the German occupation from lodging an appeal or a complaint because judges of the appropriate appellate tribunal were members of the Nasjonal Samling or otherwise guilty of treason, has the right, after the liberation, to claim a prolongation and to request that a new time limit be fixed for such action as is required. It is provided, however, that such claim must have been filed before November 17, 1945.

4. On December 18, 1942 the Norwegian Government in London issued a provisional Act relating to the invalidity of contracts connected with the enemy occupation. This enactment also contained rules regarding confiscated property and has now been superseded by two Acts, viz. Act of June 21, 1946 regarding the invalidity of certain contracts and an Act of December 13, 1946 regarding confiscated property.

The violations and wrongs which were the subject matter of the former Act could also in part have been remedied by resort to legislation in force prior to the war. However, it was found that this legislation would not cover all the cases. It would often be difficult to prove the subjective conditions for invalidating a contract on account of duress. And in those cases which were expected to be most frequent, that is cases of undue influence, it would not be possible to enforce restitution against third party acquirers who had acted in good faith. Moreover, in many cases the best solution may not be simply to declare the transaction invalid. The circumstances of the case may require a more flexible rule enabling the court to readjust the relationship between the parties, and in arriving at its decision to take into consideration also the demands of equity.

For these reasons it has been assumed that in addition to the ordinary remedies of law there is a need for a power of restitution upon consideration of the merits of each individual case. The Act provides (section 1) that transactions may be declared invalid, revised or altered if the plaintiff proves or makes it highly probable that the transaction in question was caused or influenced by:

- (a) Illegal duress or influence used by the enemy or his associates or by authorities or institutions established or approved by him, or
- (b) justifiable fear of unlawful exercise of force by the enemy or his associates or by the authorities or institutions established or approved by him, or
- (c) extraordinary conditions caused by the occupation of Norway so that under the circumstances it would be clearly inequitable to uphold the transaction without alteration.

The provisions of the Act do not give the plaintiff a *right* to have a transaction declared invalid, revised or changed when the requirements of the Act are fulfilled. The provisions of the Act are so flexible that wide scope is allowed for the exercise of the court's discretion. To a very large extent decisions must be based on considerations of equity.

A party who wishes to claim "restitution" must institute proceedings in an ordinary court. Actions of this kind are subject to special short time limits. The Act requires an action to be started within one month after it has become possible to sue under the Act and not later than May 8, 1946. In order not to give the aggrieved party an occasion to speculate at the expense of the other party it is provided that the latter may request notice of his intention without undue delay.

When it is decided that a contract ought to be modified it may have been discharged in part or in full. The Act confers wide powers upon the courts to

adjust the rights and liabilities of the parties, including the return of payments made, the termination of liability for payments due and the retention or recovery by the payor of expenses already incurred by him etc. The rules laid down in the Act should be considered as directives rather than rigid provisions of law.

5. It is laid down in section 3 of the Act relating to confiscated property that the aggrieved party can claim to be repossessed of his property without compensation and without regard to the good faith of the possessor.

Although this Act in the main only expresses a rule which was accepted beforehand in Norwegian law an enactment was required for two reasons. It was necessary to give detailed rules as to the procedure to be followed in actions for restitution, and it was desirable that persons who had been dispossessed by the Germans and their collaborators should not lose their property through the rule that acquisition in good faith creates a valid title where certain negotiable instruments are concerned.

Protection was afforded by abolishing the rule of good faith as creating a good title of acquisition in relation to property confiscated by the Germans. In order not to introduce more uncertainty than necessary the Act provides, however, that restitution pursuant to the Act can not be enforced against a defendant who has acquired a negotiable instrument after May 8, 1946 unless it be provided that the defendant was not in good faith when he acquired the document.

Confiscations carried out against private persons were contrary to international law. On the other hand it was necessary to consider the possibility that appropriations of State property in certain cases were in conformity with the rule of belligerent occupation. It was envisaged that this question might arise if the Germans had sold abroad war material belonging to the Norwegian State. Although it was expected that the courts of a foreign country might be reluctant to recognise as binding a rule making such transfers invalid the Act does not confine its effect to confiscations which are contrary to international law. If it becomes necessary to differentiate in accordance with rules of international law the questions which arise will have to be solved as matters of foreign policy and expediency.

6. On October 9, 1942 the Norwegian Government in London issued a provisional Act relating to suspension of time limits during the occupation. This Act is now superseded by a new Act of June 21, 1946.

This Act should be considered in connection with the Act of November 15, 1946 relating to the re-opening and revision of judicial and administrative decisions given during the German occupation. While the latter enactment enables a party to have judicial and administrative decisions re-opened and thereby primarily affords a legal remedy for Norwegians who spent the war years in Norway the enactment under consideration will be of special importance to those who were abroad during the occupation. The Act of June 21, 1946 purports to prevent injustice to those who in collecting a debt or instituting proceedings might otherwise have been met with the plea that the action is barred by lapse of time. And the situation would have been the same for Norwegians who were imprisoned or whose freedom of action was hampered in other ways in consequence of the enemy occupation.

In this connection time limits of various kinds and lengths have to be considered, some of which are matters of procedure and others of substantive law. Provisions regarding time limits are found at a number of places in the statute book and it would not be expedient to deal with this matter in terms which are too concrete. In the relevant Act an attempt was made to find an abstract formula covering all cases.

Section 1 provides that a party who on account of the war has been prevented from making a claim which has to be made within a time limit stipulated by law retains his right without regard to the expiration of the time limit provided that he takes the necessary legal steps before November 1, 1946. This time limit was repeatedly extended but has now expired.

Section 5 of the Act provides that a party who on account of the war has been prevented from performing an act which has to be performed within a time limit stipulated by law or in a contract in order not to forfeit a right or in order to obtain or maintain rights or benefits, can apply for a restoration of the rights which have been prejudiced. Such application must be submitted before November 1, 1946 to a court, which on deciding the matter has to take into account the interests of all parties concerned. Decisions of the Courts in these matters also have very largely been based on considerations of equity. The detailed rules contained in the Act should be considered as directives.

7. Payments of pre-occupation debts in depreciated occupation currency have not created special legal problems in Norway. Owing to the control exercised by the Price-control authorities the rise in prices was kept within reasonable bounds and consequently it was not considered necessary or expedient to introduce a new currency after the liberation.

ENEMY LEGISLATION AND JUDGMENTS IN JERSEY.

[Contributed by C. W. DURET AUBIN, C.B.E., Barrister-at-Law, H.M. Attorney-General for Jersey, 1936-1948.]

THE Armed Forces of Germany entered into effective military occupation of the Channel Islands in 1940, Guernsey being occupied on June 30 and Jersey on July 1 of that year. The occupation continued until the Liberation of the Islands by the Armed Forces of the Crown on May 9, 1945.

On July 8, 1940, the German Commandant in Jersey, promulgated, on behalf of the German Commandant in the Channel Islands, certain orders which contained, *inter alia*, the following provisions:

"The Civil Government and Courts of the Island will continue to function as heretofore save that all Laws, Ordinances, Regulations and Orders will be submitted to the German Commandant before being enacted.

"Such legislation as, in the past, required the sanction of His Britannic Majesty in Council for its validity, shall henceforth be valid on being approved by the German Commandant and thereafter sanctioned by the Bailiff of Jersey.

"The orders of the German Commandant heretofore now and hereafter issued shall in due course be registered in the records of the Island of Jersey in order that no person may plead ignorance thereof.

"Offences against the same, saving those punishable under German Military Law, shall be punishable by the Civil Courts, who shall enact suitable penalties in respect of such offences with the approval of the German Commandant."

[The Royal Court of Jersey, by Act of August 24, 1940, enacted a penalty of imprisonment, with or without hard labour, not exceeding two years or of a fine not exceeding £500 or of either, or both, of those penalties.]

During the whole of the Occupation, therefore, two main streams of legislation flowed:

- (a) Enactments of the Insular legislature (i.e. the Assembly of the States), and of Insular authorities upon which delegated authority was conferred by the States, and
- (b) Orders of the Occupying Authority emanating from:
 - (i) The Military Commandant in Jersey or in the Channel Islands;
 - (ii) The Field Commandant in the Channel Islands; and
 - (iii) The Military Commander-in-Chief in North-West France. [The Occupying Authority treated the Channel Isles as being, for administrative purposes, within the Zonal area of North-West France.]

Upon the Liberation of the Island it became necessary to regularise the position in so far as Occupation legislation, which would normally have required the Royal Assent, was concerned and by the Confirmation of Laws (Jersey) Law, 1945, sanctioned by Order of His Majesty in Council of August 14, 1945, it was

provided that forty-six such enactments should be deemed always to have had effect as if the assent of His Majesty had been signified thereto, and to have been duly registered accordingly on the dates of their original registration by the Royal Court.

In so far as delegated legislation was concerned an entirely unexpected position presented itself to the Insular Authorities upon Liberation.

Practically the whole of that class of legislation consisted of Orders made by various Competent Authorities under Regulation 55 of the Defence (Jersey) Regulations, 1939. Those Regulations had been made by the States of Jersey in exercise of the powers vested in them by the Emergency Powers (Jersey Defence) Order in Council, 1939, which extended to the Island of Jersey certain of the provisions of the Emergency Powers (Defence) Act, 1939.

Upon Liberation it was learned that His Majesty had been pleased:

- (a) by the Emergency Powers (Channel Islands) Order in Council, 1941 (made on August 15, 1941) to revoke the Emergency Powers (Jersey Defence) Order in Council, 1939, and
- (b) by the Emergency (Channel Islands) Order in Council, 1944 (made on May 18, 1944) to re-extend certain of the provisions of the Emergency Powers (Defence) Act, 1939, to the Channel Islands, substituting for the States, as the general authority empowered to make Defence Regulations, the officer for the time being in command of the Armed Forces in the Channel Islands. Provision was however made for Regulations applying only to the Islands to be made by the respective States, subject to the approval and the power of variation and reservation of the said officer.

No action was taken to confirm Orders made under the Defence (Jersey) Regulations, 1939, after the date (August 15, 1941) of the revocation of the Emergency Powers (Jersey Defence) Order in Council, 1939, the view being taken that all such orders, having been submitted to and approved by the German Commandant under the provisions of the German Order of July 8, 1940, were, in effect, orders of the Occupying Authority and as such valid and effective during the Occupation.

It was however, necessary to validate as from the date of Liberation, as many of the Orders made between August 15, 1941, and May 9, 1945, as remained of practical importance and, therefore, on June 13, 1945, the Officer Commanding the Armed Forces, Channel Islands, made a Defence Regulation providing that such Orders should have effect as if the same had been made by the Competent Military Authority under Regulation 55 of the Defence (Channel Islands) Regulations, 1944.

No action was taken to nullify the mass of orders made by the Occupying Authority, the view being taken that their validity automatically lapsed with the termination of the Occupation.

Subsequently, by the Emergency Powers (Jersey) Order in Council, 1945, of August 14, 1945, the *status quo ante* was entirely restored; the Emergency Powers (Channel Islands) Order in Council, 1944, being expressed to cease to have effect on August 25, 1945, as from which date the States were once again made the Authority empowered to make Defence Regulations.

In only two cases have the Insular Courts been called upon to consider the validity of legislation enacted during the Occupation.

In *His Majesty's Attorney General v. Houillebecq* (J. R.) (1945.31 P.C.174.13 C.R.59.) it was held that the Specified Materials (Control and Use) (Jersey) Order, 1941, an Order made by the Superior Council of the States in compliance with a direction of the German Field Commandant was, because of that direction, *intra vires* the Superior Council and that the Order, which was approved by the German Field Commandant and duly registered by the Royal Court, was therefore valid and effectual.

In *Dupré v. Attorney of Barclays Bank Limited, Babillon* cited. (1947) 243. Ex.96;210, a Currency Order (which, *inter alia*, prohibited certain stock exchange

transactions) made by the Occupying Authority on August 1, 1942, and duly registered by the Royal Court on December 12, 1942, was held to have been *intra vires* the Occupying Authority and, therefore, valid and effectual.

During the whole of the Occupation the substantive law applied in the administration of criminal and civil justice by the Insular Courts was the law as it was before the Occupation. Legislative measures taken by the Occupying Authority effected no change in the civil and criminal law of the Island and in the result, therefore, the Judgments of the Insular Courts pronounced during the Occupation were, upon Liberation, accepted as valid and binding.

With the exception of certain infractions of minor German orders (e.g. Curfew) with which the German Field Commandant directed the Insular Courts to deal, all infractions of German Orders were dealt with by German Courts.

All breaches of the Insular law other than those committed by German or Italian nationals, were dealt with by the Insular Courts.

Certain sentences for offences not connected with the Occupation were, following Liberation, revised in so far as sentence was concerned.

No question arose after Liberation regarding the validity of German convictions, whether of a political or of a non-political character, the German Commandant having released from German custody, some thirty-six hours before Liberation, all civilian prisoners serving German sentences.

During the Occupation judgments were rendered by the Courts in the name of the King. The Field Commandant did at one time direct that all criminal prosecutions ordinarily instituted in the name of His Majesty's Attorney General should, in future, be instituted in that of the Attorney General without reference to His Majesty. The Order was, however, disregarded and the normal practice was maintained throughout the Occupation.

No special tribunals were set up by or under pressure of the Occupying Authority for the purpose of dealing with breaches of regulations made with regard to the economic life of the country. Such breaches of that kind as were established were dealt with by the Insular or the German Courts according to whether the infraction alleged was of an Insular or of a German enactment.

The evacuation from the Island prior to the Occupation of some 25 per cent of the civilian population made it necessary to prolong periods of prescription and on April 29, 1944, the States enacted the Law (1944) concerning Prescription, which provided for the suspension of prescription against any person who, owing to exceptional circumstances arising directly or indirectly out of the War, was unable to take effective steps to protect his interests in the Island. The law was expressed to have retroactive effect as from June 20, 1940, which was the date of the evacuation of the Island. This Law was one of those Occupation laws in relation to which the position was regularised by the Confirmation of Laws (Jersey) Laws, 1945. (*supra*).

The Occupying Authority introduced German currency notes immediately upon the Occupation primarily for its transactions with the civilian population.

The rate of exchange between the Reichsmark and the pound was, by the Order of July 8, 1940, first fixed at eight marks to the £. On July 13, 1940, the rate was changed to seven marks to the £, on September 2, 1940, to 9.60 marks to the £, and finally on September 28, 1942, to 9.36 marks to the £. It remained at the latter rate for the remainder of the Occupation.

For some considerable time following the Occupation of the Island, British Currency and Reichsmarks were in circulation side by side but by the end of 1942 the lawful currency had virtually disappeared. It remained hidden or hoarded and, after that date, was scarcely seen in circulation. The Insular Authorities were allowed by the Occupying Authority to issue local notes to a strictly limited extent but during the last two years of the Occupation most transactions were conducted in Reichsmarks and it was feared that if, after the Occupation, that currency were treated as worthless or of little value disputes might well arise out of many financial operations which took place during the Occupa-

tion. In the event, however, no such disputes arose because His Majesty's Treasury authorised the Banks, from the date of Liberation up to May 23, 1945, when German currency of any description ceased to be legal tender in Jersey, to accept all Reichsmarks in circulation in the Island at the time of Liberation and to pay for them in sterling at the rate current at the moment of Liberation, that is to say, 9.36 Reichsmarks to the £.

In these circumstances no difficulties arose regarding the payment of pre-Occupation debts, the discharge of pre-Occupation bonds, bills of exchange and other obligations and the redemption of pre-Occupation mortgages in Occupation currency, all such transactions having been treated as valid.

One result of the evacuation, which took place immediately before the Occupation, was that owners of movable property left their property open to appropriation by persons having no right thereto. Moreover, individual members of the Occupying Forces in many cases seized goods and other movable property and later transferred them to others. During the Occupation the Insular Authorities made provision for the collection and storage of movable property belonging to evacuees and, in that way, a large quantity was preserved for the lawful owners. The Occupying Authority, however, made heavy requisitions and much of the protected property passed into German hands, nominally for use within the Island. A great deal of it was, however, exported from the Island or destroyed. The tracing of movable property, whether requisitioned without payment by the Occupying Authority or stolen or unlawfully confiscated by members of the Occupying Forces, gave rise to enormous difficulties after Liberation but, whenever any such property was found and identified, the holders thereof were not regarded as possessing a valid title to it.

As previously stated, the validity of the legal measures of the Occupying Authority has been considered by the Courts only in the two cases cited, but it can be accepted that the provisions of the Regulations annexed to the Hague Convention IV of 1907 (Section III), Military Authority over the Territory of the Hostile State, have been generally adopted by the Insular Government as the test of the validity of the legal measures adopted and other action taken by the Occupying Authority during the Occupation.

TRUSTS IN THE UNITED STATES.

[*Contributed by* PROFESSOR AUSTIN W. SCOTT.]

WHEN our ancestors came from England to America, they brought with them the English common law, or at any rate they later decided that they had done so. In many of the States it is expressly provided by constitution or by statute that the common law of England, so far as applicable to conditions here and not inconsistent with the constitution and laws of the United States or of the State, should be in force in the State. In some of them it is provided that the law thus received is the common law as of April 19, 1775, the day of the Battle of Lexington; in others, July 4, 1776, the day of the adoption of the Declaration of Independence; and in some of them it is the common law as in force previously to the adoption of the constitution of the State. As to the English statutes, also, there are provisions in several States. In some of them such statutes are made part of the law of the State if they were enacted prior to the fourth year of the reign of James I, the date of the founding of Jamestown in Virginia; in others the date is that of the Declaration of Independence.

The Americans proceeded somewhat slowly in receiving the English law of equity. In a pioneer community there was no great need for establishing courts of equity or for applying the rules which were being developed in the Court of Chancery in the mother country. Moreover, it would seem that equity was regarded by the Americans as a system closely associated with the King's prerogative, and not therefore perhaps wholly acceptable in this new republican society. But gradually the need for the system of law which was administered

by the chancellors in England began to be felt with increasing force. The writings and the teachings and the judicial decisions of Mr. Justice Story and of Chancellor Kent helped to make Equity sufficiently palatable, so that it was ultimately received as a part of the judicial system in the various States, although the Commonwealths of Massachusetts and of Pennsylvania long held out against its full reception. When the Americans accepted the system of Equity, they accepted the law of Trusts, that jurisprudentially anomalous institute to which Lord Mansfield and Professor Maitland have paid such glowing tributes.

It must be borne in mind that in the United States the law of Trusts is almost entirely a matter of State law and not of federal law. This is true even in litigation in a federal court, as, for example, where the suit is in the federal court because the parties are citizens of different States. In such a case the federal court applies the appropriate State law. The rules of the law of Trusts as administered in the forty-eight States and in the District of Columbia and in the territories of Hawaii and Alaska are much the same, since they are all derived from the English model. Where authority is lacking in a particular State, the court is very likely to follow decisions in other States, and, indeed, not infrequently, to follow the early or even the modern English decisions. There is, in other words, an Anglo-American *system* of the law of Trusts, common to England and to the States. But within that system, divergencies have inevitably occurred. In the application of the general principles underlying the law of Trusts the various States have occasionally pursued different paths, sometimes as a result of judicial decisions, sometimes as a result of legislation. On the whole, however, the divergencies between the different American States are not as great as those between these States and England, as we shall see hereafter.

During recent years an attempt has been made to state in a simple form the principles and rules of law prevailing generally in the various States in some of the principal branches of the law, such as Contracts, Torts, Property, Agency, Conflict of Laws, Restitution, Judgments and Trusts. In pursuance of this plan, the American Law Institute was organised. The so-called Restatement of the Law of Trusts was issued in 1935. Its purpose was to state the principles and rules of the law of Trusts prevailing generally in the States, without regard to particular deviations in particular States. The Restatement does not have the authority of a statute or the authority of judicial decisions. It was, however, prepared with great care and was issued only after it had received the approval of the members of the Institute coming from all of the States. As a result, the Restatement of Trusts has frequently been cited and relied upon by the courts of nearly all of the States and by the federal courts. An English lawyer reading the Restatement of Trusts will find that most of the principles and rules there stated are in accordance with the English law, except where they have been changed by English statutes; but there are of course numerous departures from the English rule, and it is the more striking of these departures which are dealt with in this monograph. Quite naturally, in the course of the century and three-quarters since the independence of the United States was proclaimed, divergencies have occurred, partly owing to the differences in conditions and partly perhaps owing to accident.

I have spoken of the development of the law of Trusts through decisions of the courts. In the United States, as in England, the course of the law of Trusts has been determined to some extent by statutes. Most of the legislation affecting trusts in the United States is legislation of the various States. In very few matters does the Congress of the United States exercise any power over the creation or administration of trusts. It is true that where trusts are administered by national banks there are a few general provisions laid down by the Congress to govern their administration, and under the authority of the Congress the Federal Reserve Board has adopted Regulations applicable to national banks; but for the most part the rules as to the administration of trusts by national banks are those which are applied by the State to banks and trust companies created by the State in

which the national bank is situated. In the statutes passed by the various States there is a considerable amount of uniformity. Several of the statutes which have been adopted in a number of States are so-called Uniform Acts, prepared by The National Conference of Commissioners on Uniform State Laws, a body in which representatives from all of the States participate. Other statutes which have been enacted and have proved successful in one of the States are subsequently enacted in other States.

English writers and English judges have occasionally spoken of the American law of Trusts, as though the rules of the law of Trusts prevail throughout the United States. Thus in *Archer-Shee v. Garland* [1931] A.C. 212, a tax case decided by the House of Lords, a question was raised as to the nature of the interest of a beneficiary of a trust created and administered in New York. Expert evidence was offered by two lawyers from New York as to the terms and the construction of a statute of the State of New York. It was held that this law was determinative of the case although it differed from the English law. Lord Tomlin referred to the rule of law thus applied as "the American law." This statement was not precise, since the rule applied was not necessarily and indeed was not in fact the rule applied in many of the States. Viscount Dunedin, on the other hand, correctly used the phrase "the law of New York."

We may now consider the principal differences which have developed between the English law as to Trusts and the law generally, though not necessarily universally, prevailing in the United States.

Investments.—In England trustees have always been restricted as to the scope of investments which they can properly make in the absence of the conferring of broader powers by the Trust instrument. There was a time when government obligations, and perhaps also first mortgages on land, were the only legal Trust investments. It is true that today the list has been greatly broadened by legislation, culminating in the Trustee Act, 1925. In Massachusetts, on the other hand, in 1830 the court laid down the broad rule that a trustee can properly make such investments as are made by men of prudence, discretion and intelligence in managing their own affairs, having in view the probable income and the probable safety of the capital. In applying this rule the court permitted the investment in shares of stock when prudently selected. In some of the States statutes confine trustees to certain types of investment, but in an increasing number of States the so-called "prudent-man rule" has been accepted by decision or, especially in very recent years, adopted by statute. This movement toward the enlarging of the scope of Trust investments has been stimulated by the decrease in income obtainable from mortgages and corporate bonds. In order to provide a proper diversification in the investment of funds of small estates, statutes recently enacted in about two-thirds of the States permit banks and trust companies to maintain so-called "common Trust funds."

Liabilities.—In England, by the Trustee Act, 1925, Section 61, the court is empowered to relieve a trustee of liability for breach of trust where he has acted honestly and reasonably, and ought fairly to be excused. Recently in a few of the States a similar provision contained in the Uniform Trusts Act has been adopted in six States. In the absence of a statutory provision like this there has been a tendency in recent years to hold that a trustee who has committed a merely technical breach of trust in failing properly to earmark investments made for the Trust is not liable for a fall in value of the investments so made, where the loss was not due to the failure to earmark but resulted from causes having no connection with such failure.

Although the courts both in England and in the United States have held trustees to strict accountability for their acts and omissions in the administration of their trusts, the American courts have gone further than those in England in imposing liabilities upon third persons who have dealt with wrong-doing trustees. In the United States, for example, it is generally held that where shares of a corporation are registered in the name of a trustee as such and he endorses the

certificates and sells the shares, it is the duty of the corporation or its transfer agent to examine the Trust instrument to determine whether the trustee is authorised to transfer the shares and, if he is not in fact so authorised, the corporation is held liable to the beneficiaries of the Trust for making the transfer. The Uniform Fiduciaries Act, which has been enacted in more than twenty States, exempts corporations from this duty and relieves them of liability except where they make the transfer with knowledge of the breach of trust or act in bad faith. Another method of relieving the corporation of the burden of ascertaining whether the trustee is committing a breach of trust in transferring the shares has recently been quite generally adopted. It is provided by statute in more than half of the States that a bank or trust company holding in trust shares of a corporation may register such shares in the name of a third person without disclosing the trust on the face of the certificate or on the books of the corporation. Where this is done the corporation is relieved of the duty of examining the Trust instrument. In the absence of statutes like these, the imposing of the duty on the corporation to examine the Trust instrument causes a considerable delay in the sale of securities held in trust.

Principal and Income.—In trusts making provision for the family of the creator of the Trust there are likely to be successive beneficiaries, the income being payable to one beneficiary or group and the principal being payable ultimately to another beneficiary or group. All too frequently a conflict arises between the income beneficiary and the principal beneficiary. What receipts are allocable to income and what expenses are chargeable to income? Generally speaking the answers given in the United States are like those given in England. In fourteen States, however, a Uniform Principal and Income Act has been adopted. The purpose of this Act is to make the administration of a trust easier by laying down definite rules for the settlement of controversies between life beneficiary and beneficiary in remainder. The Act deals with such matters as the apportionment of income from periodic payments, the disposition of ordinary and extraordinary corporate dividends and share rights, bonds purchased at a premium or at a discount, wasting property and unproductive property, such problems as were dealt with in England in the great cases of *Howe v. Earl of Dartmouth* and *Allhusen v. Whittell*.

Restraints on Alienation.—In most of the American States the creator of a trust can effectively protect the beneficiaries against their folly or misfortune by providing that their interests shall not be transferable by them and shall not be reachable by their creditors. In some States it is provided by statute that, even though the Trust instrument is silent, the interest of a beneficiary entitled to income under a trust shall not be assignable by him, and that creditors either cannot reach his interest or can reach only the excess above what is needed for his support. These trusts are commonly known as "spendthrift trusts." In England, of course, such restraints on alienation are invalid as against public policy, and if a beneficiary is entitled to enforce the payment to him of income or principal from a trust estate he can assign his interest and his creditors can reach it. It is true that in England a certain measure of protection is given to a beneficiary by a so-called protective trust where it is provided that, if he ceases to be entitled to receive the income his right to the income shall cease and thereafter the trustee shall have discretion to apply the income for his support or for the support or otherwise for the benefit of others. Under the English protective Trust, as distinguished from the American spendthrift Trust, the beneficiary cannot eat his cake and keep it. There have been bitter criticisms of the spendthrift Trust, notably by Professor John Chipman Gray, the author of a famous treatise on The Rule against Perpetuities. In some States it has been held, sometimes with reluctance, that the wife and children of the beneficiary of a spendthrift Trust can reach his interest to enforce their claim for support. Clearly, it is a shocking thing to allow a man to enjoy the income of a trust while his dependents are compelled to starve or to seek support from the Government.

Where the Government itself holds a claim against the beneficiary of a spendthrift Trust it can reach his interest. It is clear that where the beneficiary of a trust is an alien enemy no provision in the terms of the Trust can prevent the Alien Property Custodian from reaching his interest if his interest is not terminated.

The Termination of a Trust.—In England it seems to be clear that the beneficiaries of a trust can terminate it prior to the time when by its terms it is terminable, provided that they all are ascertained, are of legal capacity and consent. So also, where a trust is created under which the income is payable to a beneficiary when he reaches a certain age, thirty years for example, and he is the sole beneficiary of the Trust, he can terminate it as soon as he reaches the age of twenty-one years. In the United States the courts have generally held that the beneficiaries of a trust cannot terminate it prematurely if this would be contrary to the purpose of the settlor, unless, indeed, he should be living and should also consent to the termination of the Trust. In England the wishes of the persons holding the entire beneficial interest in the property are controlling; in the United States the wishes of the person who created the Trust control, even though he may be dead.

Compensation of Trustees.—In the United States the courts and legislatures in the various States at an early date began to depart from the English rule that a trustee is entitled to no compensation except such as may be provided for by the terms of the Trust. In many of the States the trustee is entitled to such compensation for his services as the court deems reasonable. In other States there are statutes providing for commissions on the amount of property passing through the hands of the trustee. Ordinarily the trustee is entitled to a commission based on and payable out of principal at the beginning and at the termination of the Trust, and he is also entitled to a commission on income each year payable out of the income. In several States quite recently statutes have been passed authorising the payment of an annual commission to the trustee based on and payable out of principal. The notion underlying these statutes is that owing to the fall in interest rates the compensation of trustees has become inadequate. At the same time the income payable to the life beneficiary has fallen and it would be a hardship to diminish the income further in order to increase the compensation of the trustee. It is felt that the remainderman should contribute to the expense of the management and conservation of the property.

Corporate Trustees.—The use of corporate trustees began early in the United States. Early in the nineteenth century the legislatures in the various States began incorporating banking institutions with power to administer trusts. Since then there has been a steady growth in corporate trusteeship. All of the States have enacted statutes providing for the administration of trusts and other fiduciary relations by banks and trust companies. At first the national banks created by the federal government had no power to administer trusts, but in 1913 by Act of Congress such powers were conferred upon them. Today about fifteen hundred national banks administer trusts and otherwise act in fiduciary capacities. There is, of course, no necessary connection between the business of banking and the business of administering trusts, but in the United States the two things have gone hand in hand. A recent Report of the Comptroller of the Currency shows that the assets held upon private trusts by national banks amount to about twenty billion dollars. There are no corresponding figures in the case of State banks and Trust companies, but probably property of even greater value is held in trust by the State institutions.

In the United States there is no officer corresponding to the English Public Trustee although in a few States provision is made by statute for a public administrator, to whom may be committed the administration of intestate estates, a much more limited function than that of the Public Trustee in England.

The Use of the Trust in Business.—In the United States, perhaps more than in England, the Trust has been used not merely for family purposes, but for various purposes of business. For example, when it was held in Massachusetts that a

corporation could not be created under existing legislation for the purpose of dealing in land, the Trust was employed as a substitute. The persons contributing capital to the enterprise receive certificates of beneficial interest in place of the shares which they would have received if a corporation had been formed. The certificates are readily assignable as the shares would have been. The title to the property acquired is vested in a number of trustees, instead of being vested in a corporation governed by a board of directors. By the terms of the Trust instrument the trustees are given the powers ordinarily exercised by the directors of a corporation. In order that limited liability may be achieved it is provided that in all contracts made by the trustees it shall be provided that the parties to the contract shall look solely to the trust estate and not to the trustees or beneficiaries personally. Of course, there is a risk of liability in tort, but the trustees are authorised to insure against such liability. The scheme has worked quite well, and such business trusts have been formed for various business undertakings in Massachusetts and elsewhere. For a time there was collateral advantage in obtaining exemption from certain tax burdens, but these advantages have been generally done away with by statute.

The Trust has been employed in the United States for other business purposes. For example, it is sometimes used as a device in the case of a co-operative apartment house, where the legal title is vested in trustees who hold for the various tenants the Trust instrument declaring what their rights and liabilities as beneficiaries of the Trust should be.

Perhaps the greatest single business purpose for which the Trust has been employed in the United States has been that of securing issues of corporate bonds. Since the creditors of the corporation are to be holders of bonds usually payable to bearer, it is obvious that it would be impracticable to give a mortgage directly to the bondholders. In earlier days when a railroad wished to borrow money and issue bonds it would make a mortgage or deed of trust to individual trustees to secure the issue of bonds; later it became a universal custom to employ a corporate fiduciary, a bank or trust company. A recent Report of the Comptroller of the Currency shows that national banks acting as trustees under bond issues were holding property in the amount of nearly ten billion dollars. It is probable that property of greater value is held by State banks or trust companies as trustees under bond issues, although complete statistics as to this are not available. In order to protect the bondholders, the Congress has passed a statute regulating bond issues called the Trust Indenture Act, 1939.

A very common use of the Trust is employed by corporations making provision for their employees. It is not unusual to contribute part of the earnings of the corporation to a trust to provide benefits for the employees under a pension, stock bonus, disability, death benefit or profit-sharing plan. The creation of such plans has been stimulated by the high taxes to which corporations are subject, since the plan, if approved by the tax authorities, reduces the tax liability of the corporation. Very recently in a dozen States statutes have been enacted which provide that such plans shall not be held invalid as violating the rule against perpetuities or any rule against suspension of the power of alienation or against accumulations.

Charitable Trusts.—In general the law of charitable trusts has developed along the same lines as those in England. There was a time, however, in which in half-a-dozen States, headed by New York, it was held that property could not be given for charitable purposes except through gifts and legacies to charitable corporations. In these States the Statute of Charitable Uses, enacted in the reign of Queen Elizabeth, was not a part of the law of the State. It was thought, and, as subsequent historical research has shown, erroneously thought, that charitable trusts were not enforced before the Statute was enacted. In every one of these States, however, the legislature has now made provision for the enforcement of charitable trusts. The purposes which are held to be charitable are much the same in the United States as in England. The doctrine of *cy près* has been applied, although the so-called prerogative application of the doctrine, as

distinguished from its judicial application, has been rejected in the United States, with a possible question whether to some extent the legislature may have succeeded to the prerogative power of the King as *parens patriae*. In a few States, the doctrine has been accepted more grudgingly than in the other States and in England.

The machinery for supervising and enforcing charitable trusts, however, is much cruder in the United States than it is in England. The need for a better supervision was shown in England by the reports made by Lord Brougham's Commission in the early part of the nineteenth century. Parliament saw the need and established the Board of Charity Commissioners which has exercised so great an influence on charitable foundations in England. In the United States, it is true, charitable trusts are enforceable by the courts at the suit of the Attorney General. In most States, however, the office of the Attorney General is not so constituted as to enable him really to see that the purposes of charitable trusts are properly carried out. In one of the States, New Hampshire, a statute has been enacted which requires registration of charitable trusts with the Attorney General and requires the trustees to make annual reports to him. In Massachusetts a statute requires trustees whether incorporated or unincorporated, holding property in trust for charitable purposes to report to the Department of Public Welfare. In none of the States is there anything like the systematic supervision which is given in England to the administration of charitable trusts. The legislation in the two New England States is perhaps only the beginning of a movement toward such supervision.

Resulting Trusts.—The law as to resulting trusts is apparently about the same in the United States as in England. A resulting trust arises where a person makes or causes to be made the conveyance of property under circumstances which raise an inference that he does not intend the transferee to have the beneficial interest. A resulting trust thus arises where a trust fails in whole or in part, or where a trust is fully performed without exhausting the trust estate, or where one purchases property in the name of another. In the first two situations the person who holds the legal title to the property holds it upon a resulting trust for the person who made the conveyance in trust, and in the third situation he holds it upon a resulting trust for the person who paid the purchase price. In all of these cases the trust arises because of the circumstance that the person to whom the legal title was given was not intended to take it beneficially, and hence he must give it back. In a few States, however, statutes have been passed abolishing the resulting trust in the case where one person pays the purchase price for a conveyance to another. Except for the statutory change made in these States, the results reached in the American courts are closely akin to those reached by the English courts.

Constructive Trusts.—The concept of a constructive trust as a judicial remedy seems to be much more liberally applied in the United States than in England. In the United States it is stated in the Restatement of Restitution, issued by the American Law Institute, that "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." The concept is a very broad one. The unjust enrichment may arise from fraud, duress, undue influence, mistake, accident, abuse of a fiduciary position, or otherwise. The notion of unjust enrichment underlies the law of Quasi Contracts as well as that of Constructive Trusts. In both branches of the law the American courts have become accustomed to the idea of preventing one person from unjustly retaining property to which another is justly entitled, and have had no great difficulty in applying the idea. On the other hand, in England the courts seem to feel that the notion of unjust enrichment is too tenuous to be the foundation for a judicial remedy. English writers sometimes define a constructive trust in such a way as to limit it to situations where a person has been guilty of fraud,

although they sometimes broaden this by introducing a notion of fictitious or constructive fraud. Other writers define a constructive trust in such a way as to limit it to cases where the defendant has been guilty of the abuse of a fiduciary obligation. There seems to be no reason why this judicial weapon should be limited to either or both of these situations. In a decision rendered by the Court of Appeals of New York, Judge Cardozo (later Mr. Justice Cardozo of the Supreme Court of the United States), said: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

THE SHARI'A TODAY

[Contributed by J. N. D. ANDERSON, ESQ., O.B.E.]

To the pious Muslim the *Shari'a* is still, as it has always been, divinely authoritative. To him no code of conduct or even scale of values can be formulated by mere human reason: all must, of necessity, be based on divine Revelation. An act is good solely because God has commanded it, or bad because He has forbidden it. The *Shari'a*, therefore, covers a much wider field than any modern legal system and regulates every aspect and detail of a man's life—his conduct towards God, the State, his fellow creatures, his family, and himself. Only part (and that a somewhat fluid part) of this vast and comprehensive system has ever been enforced by courts of law: for the rest, the sanction is reserved for the Hereafter.

To understand recent developments, however, it is necessary to examine rather more closely the different sources from which the *Shari'a* is derived and the authority attributed to each. Its primary source is, of course, the *Qur'an*, which is regarded as the *ipsissima verba* of God. But the number of verses in the *Qur'an* which have any legal significance is small in the extreme. From the earliest days, therefore, a second source was found in the sayings and practice (*Sunna*) of the Prophet, as recorded for later generations in Traditions (*Hadith*) of his words and actions which were regarded as inspired in content though not in form. As time went on, the demand for Traditions to settle points of law steadily grew, and the supply largely kept pace with the demand: but, while the basis on which the law might be built up was thereby greatly extended, a cause of much dispute and uncertainty was introduced, for Muslims have always realised that many of these Traditions were corrupted in transmission and that a vast number were pure fabrications. Again, the authority of both *Qur'an* and *Sunna* is complicated by the doctrine of abrogation (by which an earlier revelation is regarded as abrogated by a later one), for not only are the comparative dates of both *Qur'anic* texts and individual Traditions often in doubt, but in theory at least some lost Tradition may have abrogated any existing revelation. Still, the *Qur'an* and Traditions stand as the Sources par excellence of the *Shari'a* law, and where no doubt is thrown upon them by the possibility of abrogation (which is rare) or fabrication (which is far from rare) the text (*nass*) concerned has for centuries been regarded as final and unchangeable—unless indeed its apparent import is avoided by some form of interpretation.

In addition to these two primary sources, however (and to that customary law to which in fact, though not in later theory, so much of the developed law can ultimately be traced) a major part has also been played by the deductions and reasonings of generations of early jurists. This function (known as *ijtihad*) varied from a wide use of private judgment (*ra'y*) to a strictly analogical application of the primary Sources to new facts (*qiyas*), although as time went on the former was more and more restricted in favour of the latter, which became recognised as a formal source of law. Where, moreover, general agreement was

reached the rule concerned was regarded as divinely established, by the doctrine of the infallibility of the Muslim community as an whole or of its doctors of law in particular—and this agreement (*ijma*¹) became accepted as a valid source of law which in its turn might be extended by analogy. But in very many cases no such agreement was in fact reached; for different schools of law, developing in different centres, under varied circumstances and influences, and accepting or rejecting different Traditions, naturally reached conclusions which varied considerably. This was inevitable because the systems thus built up were all largely theoretical and divorced from ordinary life: hypothetical cases were as seriously discussed as those which actually came before the Courts; and, while a jurist's opinions might have great weight, there was no doctrine of binding precedents, no appellate jurisdiction, and no body which could give authoritative rulings. Serious diversities thus developed even among the Sunnis or "orthodox" body of Muslims (to say nothing of the "heterodox" Khawarij and numerous Shi'i sects), but a compromise was found by which a number of schools mutually recognised each other's orthodoxy: and of these schools four (the *Hanafis*, *Malikis*, *Shafi'is* and *Hanbalis*) survive to this day.

As these schools become crystallised, so the scope of independent deduction became more and more prescribed, and by the end of the third century of the *Hijra* the door of *ijtihad* was regarded as closed. Henceforth every jurist (in the orthodox view) was a mere *muqallid*, one who must accept as authoritative the opinions of his predecessors. And although a few authorities maintained that he might still on each point choose which of several variant opinions to follow, the vast majority limited any such choice to variant opinions within his own particular school. Almost from the first, moreover, the *Shari'a* found serious rivals in local custom and the edicts of Caliphs and governors, rivals which impinged upon its nominally universal domain to a greater or less extent according to the relative orthodoxy of the ruler concerned, the influence of the *Shari'a* lawyers, and the circumstances of the place and time.

This was the position until modern times. Muslim law was largely moribund, and *Shari'a* lawyers got no further than consulting or compiling commentaries on commentaries on commentaries. There was, moreover, virtually no interchange (except by way of argument) between the different schools. True, their distribution was largely geographical, yet at many of the centres of Islam *Qadis* of the rival schools held their courts side by side, and the decision of many a case would depend almost entirely on the school of the *Qadi* to which it was referred. Each, however, would enforce as *res judicata* a decision of his fellows, however different his own decision would have been in the case concerned or would be in an exactly similar case referred to him in future. The law suffered, therefore, from much uncertainty, and was complicated by the mass of books of reference to which recourse might be had.

It is against such a background that the political and cultural incursions of the West into the Muslim world, and the subsequent Turkish and Arab awakening, must be viewed. In Turkey reform took the form of the *Tanzimat* legislation, which was designed both to re-establish confidence in the Empire and to impress European Powers. Thus in 1858 a *Penal Code*, in 1861 a *Commercial Code*, and in 1863 a *Code of Maritime Commercial Law* were promulgated, all based on European, and particularly French, models. In the main these may, however, be regarded as additional, rather than contrary, to the *Shari'a*, and the Turkish reformers at this time consistently refused to repeal even such controversial provisions of the *Shari'a* as the death penalty for apostasy from Islam and the ineligibility of non-Muslim witnesses in a Muslim law suit. At the same time secular (*Nizamiya*) Courts were set up to apply this new legislation, together with Mixed Courts to deal with cases between Ottoman subjects and foreigners—while the latter enjoyed among themselves, under the Capitulations, an extension of that separate and community jurisdiction for long conceded to the non-Muslim minorities.

Between 1869 and 1876, moreover, the *Hanafi* law of obligations (*mu'amalat*) was codified in the "*Majalla*" as the Civil Law Code of the Turkish Empire. This was particularly designed for use by the newly-instituted *Nizamiya* tribunals, whose judges needed some more accessible, easily understandable, and decisive book of reference than the voluminous compendiums and commentaries of the past: its authors, moreover, attempted to choose those opinions of *Hanafi* jurists which best accorded with the requirements of modern life. The *Majalla*, however, was not made obligatory, in that *Shari'a* judges and lawyers were always free to refer to the older books of reference. It was not, moreover, until the introduction of the "Ottoman Family Law" in 1917 that the important step was taken of combining *Hanafi* rules with provisions borrowed from other schools (e.g. in the question of the validity of marriages contracted under compulsion or of divorces uttered under compulsion or intoxication, and in the question of the dissolution of marriages for ill-treatment, etc.) But to this principle we shall return later.

The *Majalla* was applied in most parts of the Ottoman Empire but not in Egypt, which at this time was already started on the road to independence. It is still in force today in Palestine, Trans-Jordan, Iraq and Syria, although in all these countries it has been frequently amended or superseded in different points by statute law. In the Lebanon the Law of Ownership (1930) (which also applies to Syria) and particularly the Law of Obligations and Contracts (1932) have largely superseded the *Majalla*, which only survives today in a few particulars such as the interdiction of minors, lunatics and others unfit to manage their property; the law of *mudaraba*, *muzara'a*, *musaqat* and *mugharasa* (different forms of agricultural contracts recognised by the *Shari'a*); the rules concerning the validity of dispositions, and particularly wills, made during "Death Sickness"; and certain provisions concerning land tenure and sport. Legislation based on Western models covers all other branches of the law except for matters of personal status, and even here legislation was introduced in 1942 reorganising the *Shari'a* Courts and laying down that the *Sunni* Courts should apply the Ottoman Family Law of 1917 and, in all else, the "best *Hanafi* opinion," while the *Shi'i* Courts were to apply such of the Ottoman Family Law as was conformable to their own legal system.

But it is in Egypt that some of the most interesting developments have taken place, and with these we shall deal in more detail. Some of the earlier *Tanzimat* reforms were applied in Egypt as in other parts of the Ottoman Empire, and in particular the establishment of *Nizamiya* Courts considerably restricted the jurisdiction of the *Shari'a* Courts: but the *Majalla*, as we have seen, was never introduced, for in 1874 Egypt attained juridical and administrative independence under *Isma'il* Pasha. But the reform movement continued strongly, and in 1875 the Mixed Courts were set up to deal with cases between Egyptians and foreigners, while in 1883 the Native Courts were instituted (in place of the *Nizamiya* tribunals) and the *Shari'a* Courts were henceforth confined to matters of marriage, divorce, parentage, guardianship, maintenance and succession, together with gifts and "foundations" (*waqfs*), in so far as the Muslim population was concerned. At the same time both a penal and civil code was promulgated for these new Courts, derived almost entirely from the Napoleonic Codes. Certain concessions, it is true, were made to Islamic sentiment, for the penal code was represented as an extension of that *ta'zir* (or punishment at the discretion of the ruler or judge for wrong-doing which did not come within the exact definition or degree of legal proof laid down for certain specified offences) for which the *Shari'a* had always made provision, while clauses were inserted both forbidding the imposition of the death penalty on a Muslim unless the *Mufti*¹ confirmed that this penalty could lawfully be imposed under the *Shari'a* in the circumstances, and also laying down that the code did not destroy any personal rights (such as that to blood money) which the *Shari'a* established.

It may well be asked why the *Shari'a* was thus progressively set aside in

¹ An Official whose duty it is to answer questions put to him concerning Muslim law.

favour of codes derived from Western sources. Initially this was far less the result of any popular movement of reform than imposed on the people from above, in the interests on the one hand of administrative efficiency and national progress and on the other to satisfy foreign opinion. As time went on, however, the more conservative opinion which lamented this progressive departure from the *Shari'a* has been challenged by a variety of arguments on the part of the more progressive elements which supported what had been done and sometimes advocated further action. Some used political arguments, such as the need to follow closely in the path of Western progress and to convince the West of Egypt's emancipation from those elements in the *Shari'a* which cause particularly adverse comment (e.g. mutilation for theft, retaliation in kind for assault or homicide, or provisions for a maximum period of gestation fixed by the *Hanafis* at two and by the *Shafi'is* and *Malikis* at four years). Others used economic arguments, such as dissatisfaction with the system of *Waqfs* or religious and private foundations, under which a vast amount of the national wealth was held in a dead hand, maladministered and unproductive; or such as the need for a commercial law free from the meticulous restrictions of the law of usury which, if strictly applied (and apart from those devices by which it was frequently evaded from the very first), would outlaw most modern commercial activities and leave all economic development of Muslim lands to foreign capital. Others again used more strictly legal arguments, such as the inadequacy of archaic rules of procedure and evidence which excluded inferential evidence even of the most conclusive character and gave disproportionate weight to oral testimony; or such as a desire for a code which gave definite rulings and could be consulted and understood with comparative ease (a need only partially met by *Qadri Pasha's* codification of *Hanafi* personal law). Finally, there were social arguments, such as a desire for reforms which seemed to be blocked by a law which was regarded as divinely authoritative and unchangeable.

Thus to set on one side the *Shari'a* as a whole in all but matters of personal status and a few others might seem at first sight the most drastic action that could be taken, and there can be little doubt that some of those who supported this procedure felt that anything less would be inadequate. To others, however, this appeared far less drastic than any attempt to reform the *Shari'a*, for to Muslim opinion it is always less serious to ignore than to deny. The attitude largely adopted, therefore, was that, while it would have been unbelief to criticise or in any way to alter the *Shari'a* which must always be regarded as an ideal system for an ideal age, it must be recognised that modern life, with its complexities, its deterioration of moral standards, its progress in constitutional theory, scientific methods, and industrial development, and its greater emphasis on humanitarian principles, made its application in all but personal status impracticable. Nor was Egypt, as we have seen, by any means alone in such a restriction of the scope of the *Shari'a*, for it prevails today throughout the greater part of the Muslim world. In modern Turkey, indeed, the same principle has now been carried far further and the *Shari'a* abolished *in toto* in favour of the Swiss code on the grounds that the progress of the country demanded such action, sometimes supported by the argument, on the part of those who seek to combine piety with progress, that the *Shari'a* should regulate the private life of a Muslim before his God, not the behaviour of a citizen of a modern state before his fellow citizens and government.

More latterly, however, a new movement has developed in certain quarters—a movement for the reform of the *Shari'a* itself. In Egypt this started within the bounds of that personal law in which it was felt that the *Shari'a* could not be put aside, but in which the more progressive elements saw considerable need for reform. The first method adopted was tentative only, and consisted not in any change in the substantive law but in such decrees addressed to judicial and administrative officials as were calculated to dissuade the public from exercising certain rights the essential legality of which was not called in question. Thus as

early as 1897 the *Shari'a* courts were forbidden to hear marriage pleas of various kinds unless the marriages had been recorded in writing, and this law was progressively amended in 1910, 1931 and 1933, so that the law now stands that the Courts may not hear any contested plea based on a marriage which has not been officially registered by the competent official or where the husband has not reached the age of 18 and the wife of 16 at the time when the plea is raised: while the competent officials are also forbidden under penalty to register marriages between parties who have not reached these prescribed ages. Not, be it noted, that a marriage of two infants concluded by their guardians under the *Shari'a* is not perfectly legal in itself: for the explanatory memorandum attached to the new legislation makes it clear that its authors aimed at limiting child marriage not by any direct amendment of the law but in an indirect and negative way (presumably because Prophetic precedent for child-marriage clearly exists). And the same course has been taken in a number of other matters, such as pleas of affiliation—where the *Shari'a* principle that a child born to a married woman can only be repudiated by her husband on proof of adultery or by the process of *li'an* has been modified in practice, though not touched in essence, by the rule that a contested plea of affiliation is not to be heard where the alleged father can prove non-access to the mother since the date of their marriage or where it can be shown that the mother was widowed or divorced more than a year before the child was born. And many other examples could be quoted from the new law of *Waqf* (1946) of the same procedure, which is commonly represented as an application of the *Shari'a* principle that a ruler may always limit the competence of his judges with regard to the locality or duration of their jurisdiction or the type of cases they may hear.

But a far more drastic expedient has been adopted in recent legislation, where parts of the substantive law to be applied by the *Shari'a* Courts have been amended and authoritatively laid down. This legislation treats parts of the law of marriage and divorce, almost all the law of inheritance and testamentary dispositions, and a great deal of the law of *Waqf*. But the most interesting point to notice is the principles on which these amendments have been introduced, and it is to these that we must now turn.

The principle most extensively invoked hitherto has been what is termed "*tafiiq*", or an eclectic principle (which we have already noticed in passing in the Ottoman Family Law of 1917), by which the Committees drafting the laws concerned refused to hold themselves exclusively bound by the rules of the *Hanafi* school but felt themselves free to choose one point from one school and another from another. Thus in *Law No. 25 of 1920* two *Shafi'i* principles were preferred to those of the *Hanafi* school regarding a husband's liability to pay past maintenance due to his wife or newly-divorced wife; while *Maliki* principles were adopted concerning both the maintenance or judicial divorce of a wife whose husband cannot, will not, or does not support her and concerning the judicial divorce of a wife who unwittingly marries a man afflicted by some serious disease or disability or of a wife whose husband subsequently becomes so afflicted. Again, in *Law No. 25 of 1929* the *Hanafi* rules regarding divorce were abandoned in favour of those of the three other schools as to the effect of a divorce uttered under compulsion or intoxication (though on the latter point the jurists of these schools are divided among themselves); in favour of those of *Shafi'i* and *Malik* as to the effect of ambiguous expressions; in favour of those of *Shafi'i* as to the effect of divorce expressed in absolute terms but without using the triple formula; while as to the effect of a single utterance of divorce accompanied by the word or sign of three or of a contingent divorce used as an oath or threat without any real desire that it should take effect the views of the leading authorities of all four schools have been abandoned for those of *Ibn Taymiya* (a somewhat eccentric jurist of the *Hanbali* school who died early in the fourteenth century A.D.) and of certain others. In addition, the law of 1929 has adopted the *Maliki* provision for the judicial divorce of wives on the grounds of the cruelty, desertion, or long imprisonment of their husbands, although the rule that the husband must have been absent

or imprisoned for at least a solar year before this plea can be entertained has a distinctly western flavour (since the Muslim year is always lunar). All these amendments to the existing law have been introduced, of course, as being less stringent or more equitable than the corresponding *Hanafi* rules.

Where the views adopted have been those of some recognised *mujtahid*² of one of the four schools—or, still more, within the *Hanafi* school—it might, of course, be maintained that the framers of this new legislation have done no more than exercise the right conceded by certain authorities to every *muqallid*,³ namely the right to choose which of the acknowledged *mujtahids* he will follow in any particular point. In fact, however, they have gone a good deal further than this in at least three respects. In the first place they have on a number of occasions abandoned the view of all the normally recognised *mujtahids* in favour of some single jurist such as *Ibn Taymiya*—and that in some isolated point or points, without accepting any general application of those principles on which he based his conclusion; in the second place, they have frequently so combined the rules of two or more schools on some one point as to make what is in effect a new rule; while, in the third place, they have occasionally rejected the opinions of all the authorities of the past in favour of one suggested by contemporary opinion. An instance of this in the legislation so far examined is in *Law No. 25 of 1929*, where the maximum period during which a divorced wife can claim maintenance on the ground of pregnancy is fixed at one solar year—instead of the two years (or in some circumstances even more) prescribed by the *Hanafi* jurists of the past or the four years prescribed by *Maliki* and *Shafi'i* jurists. This is justified by the fact that there is no Qur'anic text on this subject and the only authority is a saying attributed to 'A'isha which is regarded by some as of doubtful authenticity and by others as based on women's gossip rather than any dictum of the Prophet: in such circumstances the framers of the new law felt at liberty to consult modern medical opinion and to adopt one solar year as the maximum period of gestation for legislative purposes.

The significance of this must not, of course, be exaggerated, but equally it must not be missed. It amounts in effect to a concession to what has been insistently claimed by Muslim modernists of recent years, namely the reopening of the door of *ijtihad*. In this many modern Muslims see the greatest hope for the future, for thereby they aim to sweep away the accumulated accretions of the middle ages and re-interpret primitive Islam in terms of modern life. In certain recent books a clear distinction has indeed been made between rules resting on Qur'anic or Traditional texts and those based in *ijtihad*, and the suggestion has been made that while the former are immutable (unless an unfortunate Tradition can be disposed of in the same way as that of 'A'isha above, or a Qur'anic verse subjected to interpretative restriction) the latter are capable of indefinite adaptation and amendment. Such writers, it is true, sometimes fail to observe that even the opening of the door of *ijtihad* can only affect matters on which agreement has not been reached in the past, unless indeed the doctrine of *Ijma'* is also to be attacked or extended. Others, however, make no bones about this, assert that the Muslim community has in fact often gone astray, and reject the Tradition "My Community will never agree upon an error" as emphatically as they reject the complementary Tradition "The disagreement of my Community is a mercy from God." Others, again, maintain that the agreement of the past can be abrogated by the agreement of the present and the future, and hope to use *Ijma'* as an instrument of reform.

It is when we turn to the recent Egyptian legislation regarding Inheritance, *Waqfs* and Wills, however, that we see the freedom with which the principle of *talfiq* at least has recently been applied in Egypt. Perhaps a summary analysis of *Law No. 77 of 1943* regarding Inheritance will suffice by way of illustration. Thus in the vexed question as to whether a child born dead as a result of an assault on

² One who has the right to exercise *ijtihad*, or independent deduction. See p. 18.

³ One who must follow the rulings of others. See p. 19.

his mother should be regarded as able to inherit and pass inheritance (including blood money) to his heirs, the law has forsaken the divergent views of both the *Hanafi* and the other three schools in favour of that of early jurists such as *Rabi'a ibn Abu Abdul Rahman* and *al Layth ibn Sa'd*. Similarly, while in cases where there has been no assault on the mother the *Hanafi* rule that a child can inherit and pass inheritance if more than half born alive has been rejected in favour of the insistence of the other three schools on its being wholly born alive, the normal rule of all four schools that a child (other than an alleged child of the deceased) will not be entitled to inherit if born more than 6 months after his death has been abandoned in favour of a dictum of *Ibn Taymiya* in favour of a nine months' limit in such cases. Again, in the matter of the priority of charges on a dead man's estate the new law has so combined the views of *Ibn Hanbal*, *Abu Yusuf* and *Abu Hanifa* as to lay down an order of priority which is, in its complete form, wholly new; and the same remark applies to the rules regarding the mutual rights of inheritance of non-Muslims from different countries of domicile, where the views of *Malik* and *Hanbal* are in general adopted, but varied by one exception based on *Abu Hanifa's* opinion.

In regard to the sort of homicide which will exclude the slayer from rights of inheritance to the slain the views of *Malik* have been adopted, and *Maliki* and *Shafi'i* views are again preferred in the problem known as the *Himariya* or *Mushtaraka* (whereby brothers and sisters of the full blood are sometimes allowed to share with uterine brothers and sisters in the portion of inheritance normally reserved for the latter). In the very vexed question as to the right of inheritance of a grandfather in competition with brothers and sisters the *Hanafi* and *Hanbali* rules are rejected in favour, in general, of *Maliki* and *Shafi'i* principles, but in particular the view attributed to the Caliph '*Ali ibn Abu Talib*' has been so combined with that of *Zayd ibn Thabit* as to produce what is, in effect, a new rule—while in the doctrine of the "Return"⁴ the views of *Abu Hanifa* and *Hanbal* have been retained but combined with the opinion of '*Uthman ibn 'Affan*' regarding the position of the spouse relict. In regard to the right of inheritance of cognates the view of *Abu Yusuf* (and, indeed certain views attributed to him in preference to others also so attributed) have been preferred to those of *Muhammad al Shaybani* previously followed in Egypt; while in the matter of the place of the patron in the list of heirs the views of certain jurists such as '*Abdulla ibn Mas'ud*' have been preferred to those of any of the four schools existent today. Finally, in the question of the "acknowledged kinsman" the *Hanafi* principle of including him among the heirs is rejected; but he is given a right to the estate on other principles, but much the same conditions, if no heirs exist.

Space forbids any similar consideration of the other new Laws. Suffice it to say that the new law of *Waqf* (1946) is even more radical in its amendments to the existing law, and well deserves separate and detailed examination. It may confidently be expected, moreover, that still more of those parts of the *Shari'a* still applied in Egypt will be amended and codified.⁵ Some, however, have recently begun to demand something much more far-reaching, namely the compilation of a complete legal system to cover every branch of the law based fundamentally on the *Shari'a* but somehow adapted to modern needs. It is argued that the political independence recently achieved should extend to culture and jurisprudence; that legal systems imported wholesale from the West cannot suit the Middle East; and that the laws of the country should be derived from the same Muslim heritage from which so much of the character and customs of the people have always been drawn. A complete system of

⁴ A doctrine under which those heirs who are accorded a specific share of the estate before the residuary heirs take the remainder will themselves divide that remainder, in proportion to their shares, in the absence of any residuary heirs.

⁵ A comprehensive draft has, in fact, already been proposed.

this sort, moreover, would obviate the need for different types of Courts or even, perhaps, for a personal law peculiar to each religious group.

Yet the problems inherent in any such endeavour are formidable in the extreme, for in an undertaking of this scope and breadth the liberal principles used in previous legislation would prove totally inadequate, however widely and boldly they were applied. This is shown in the proposals of men like *Sanhuri* Pasha, who in 1942 completed a draft of a new Civil Code for Iraq based on "Islamic legal texts, with such additions from contemporary legislation as circumstances require" and who recently presided over a Committee which drafted a similar (tentative) Civil Code for Egypt composed of 1591 Articles drawn from "comparative jurisprudence, the decisions of the Egyptian judicature, and the *Shari'a*" and providing that Judges should be bound by the *Shari'a* in any points not covered by the Code. These two drafts, neither of which has yet advanced beyond the stage of official consideration, are thus based partially, though not exclusively, on the *Shari'a*, to which the additional material is supposed to be supplementary rather than contradictory. In reality, of course, there is a great deal which undeniably conflicts with the *Shari'a* as historically known: and while this is partially justified on those principles concerning *ijtihad* and *ijma* which we have already discussed, the supporters of these new Codes have also been forced to rely on a far more drastic and sweeping justification for innovation. This they have found in the doctrine of *Darura* (necessity) or *Maslaha* (general welfare)—a doctrine which they have even applied to the otherwise immutable authority of Qur'anic texts and unimpeachable Prophetic traditions. By the strict Muslim of the liberal school this doctrine is interpreted as meaning that commands and prohibitions applicable to the Arabia of the first century if the *Hijra* need not always be regarded as literally binding today: it is the underlying principles which remain, while their application changes with circumstances. To the middle party, on the other hand, the commands and prohibitions stand unchanged, and the way of true reform would be their literal enforcement: but the conditions of modern life, and the force of non-Muslim world opinion, make it impracticable and inadvisable to make any such attempt, so consolation is found in the eschatological predictions of early Islam that such conditions would prevail at the end of the age. To the real conservative, however, the desire for such a code often seems wholly misplaced: for he argues that a system so amended can in no real sense remain the *Shari'a* at all, and that the cause of Islamic piety would be better served by preserving the *Shari'a* intact as a theoretical system, however much its place may have to be taken in practice by secular legislation. And in this, at least, he is supported by the thorough-going progressive, who considers that the price demanded by the purists is altogether too high, and that the legislation of a modern state should be unfettered by even the loosened shackles of the distant past.

Which party will win the day remains, at the present, a matter for speculation.

MARRIAGE AND KINDRED SUBJECTS IN ENGLAND, SINGAPORE AND CHINA

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Introduction.

(1) *General.* This paper deals with certain aspects of the law governing five subjects, namely, marriage, the matrimonial property regime, matrimonial causes, legitimacy (with legitimation and adoption), and succession. One postulates the existence of a certain foreign element, namely, the fact that a party or other material person (*e.g.* the deceased husband of a party) is, or was, a Chinese.

One seeks to enquire under what circumstances the Court (a) in England (b) in Singapore takes the law of China into consideration, and what are the rules of Chinese law which the Court applies.

Unless otherwise indicated, the modern law is stated as on June 30, 1946.

In this paper only the general rules of the ordinary law can be considered: this will exclude emergency regulations, or special circumstances (*e.g.* where the Chinese is a Mohammedan or a Christian), or special difficulties (*e.g.* a divergence between Chinese law and the custom of the Chinese in Singapore). The present writer accepts responsibility for the accuracy of the renderings from the Chinese Civil Code.

(2) *The law of Singapore.* Singapore, now a separate Colony, in general retains¹ the law of the Straits Settlements, of which it was formerly a part.

The law of Singapore consists of²

- (a) the English statute law, common law, and equity as on November 26, 1826, so far as applicable;
- (b) later English statutes applicable to the Colony;
- (c) local Ordinances;
- (d) statutory orders of the Crown in Council;
- (e) non-statutory orders of the Crown in Council.³

English conflict rules formed part of the English law thus imported.

The majority of the English conflict rules are laid down in decisions of the English Courts: the Court in Singapore ordinarily follows the decisions of the English Courts;⁴ it might, however, feel constrained to differ in certain cases, *e.g.*, if the point to be decided were the same as that in *In re Paine*⁵ or that in *In re Luck's Settlement Trusts*.⁶

As regards (a) above, the Court has held (1) that the law of the land is so much of the law of England as was in existence when it was imported and was of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants; (2) that that law is subject, in its application to the various races established in the Colony, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.⁷

It must here be pointed out that in the reported cases in which the Court of the Straits Settlements was called upon to take Chinese law and custom into consideration, the material facts occurred before 1929,⁸ and therefore the Chinese law

¹ S. R. and O. 1946 No. 464.

² Cf. Braddell. *The Law of the Straits Settlements*. 2nd edition. (1931.) p. 60.

³ Halsbury's *Laws of England*. Vol. XI. p. 13. The power to legislate by Order in Council is usually termed "prerogative," but the Privy Council does not favour this term (*Abeyesekara v. Jayatilake*. [1932] A.C.260). The exercise of this power grows rarer; to provide for colonial defence on the outbreak of war in 1914, an Order by Her late Majesty Queen Victoria in Council, dated October 26, 1896, was published as Notification No.937 in the Straits Settlements Government Gazette of August 6, 1914; in 1939, however, a corresponding Order in Council, called the Emergency Powers (Colonial Defence) Order in Council, 1939, purported to be made by virtue of powers conferred by Section 4 (1) of the Emergency Powers (Defence) Act, 1939; it was published as Notification No. 2643 in the Gazette of August 31, 1939.

⁴ A colonial Court of Appeal is bound by decisions of the Privy Council and the House of Lords only (*Robins v National Trust Co. Ltd.* [1927] A.C. 515). An odd situation arises when the Privy Council and the House of Lords give contrary decisions on a point of English law; to follow the House of Lords is to prefer a "foreign" to a "colonial" Court; to follow the Privy Council is to prefer a fallible to an infallible Court. In the Alberta Supreme Court, Ford J. has held that when the House of Lords in its decision expressly states in what respect the Privy Council erred, a Canadian Court must apply the law as so settled by the House of Lords (*Will v Bank of Montreal*. [1931] 3 D.L.R. 526). Inferior Courts and the King's subjects have waited for 17 years in uncertainty whether the decision of Ford J. was correct; under the present English system they may go on waiting indefinitely.

⁵ [1940] Ch. 46. Cf. Note 21 *infra*.

⁶ [1940] Ch. 864. Cf. Note 69 *infra*.

⁷ *Choa Choon Neoh v Spottiswoode*. (1869). 1 Kyshe. 216, 221; approved by the Privy Council in *Yeap Cheah Neo v Ong Cheng Neo*. (1875). L.R. 6 P.C. 381, 396.

⁸ The last case was *Chia Teck Leong and four others v Estate and Trust Agencies* (1927) Ltd. [1939] S.S.L.R. 94 in the series of "Straits Settlements Law Reports" which came to an end in 1941.

and custom so taken into consideration was that which prevailed prior to the changes made by the Civil Code of 1929-1931.

(3) *The law of China.* The necessity for reforming the laws of China was realized under the Empire, and in 1904 the Emperor Kuang Hsü appointed three commissioners to compile a commercial code.⁹ The first Codification Commission was constituted in 1906; but the work of this Commission and its successors was greatly hindered by political upheavals and civil wars.

With the establishment of the Nationalist Government in 1928, the duties of the Codification Commission were taken over by the *Li Fa Yüan* or Legislative Council.¹⁰

The fundamental principles to be incorporated in a new Civil Code were laid down by the Central Political Council¹¹ of the Kuomintang, which dictated matters of policy to the *Li Fa Yüan*; the latter being, in this respect, little more than a drafting office.

After examining a large number of modern codes,¹² the *Li Fa Yüan* drafted a civil and commercial code,¹³ the so-called Civil Code.

Book I on General Principles was promulgated on May 23, 1929, and came into force on October 10, 1929;¹⁴ Book II on Obligations was promulgated on November 21, 1929; Book III on Rights over Things was promulgated on November 30, 1929; Books II and III came into force on May 5, 1930;¹⁵ Book IV on Family Law and Book V on Succession were promulgated on December 26, 1930, and came into force on May 5, 1931.¹⁶

An English translation (sometimes inaccurate) of the Civil Code by Dr. Ching-lin Hsia and others was published by Messrs. Kelly and Walsh in 1931.

The Civil Code revolutionized the then existing Chinese Law, which was in substance a readaptation of an earlier code dating from the 8th century,¹⁷ but it still left much room for the application of local customs.¹⁸

Marriage.

The law of England.

Marriage is monogamous.¹⁹

English conflict rules.

Capacity.

(1) The law of China is applied to test the capacity of the parties if the marriage was celebrated in China.²⁰

(2) According to the most recent decision, the law of China is applied to test the capacity of a party whose domicile was in China at the time of the marriage.²¹

Formalities.

The law of China is applied to test the formal validity of a marriage if it was celebrated in China.²²

⁹ Ching-lin Hsia and others. *The Civil Code of the Republic of China.* (1931). p.x.

¹⁰ *op. cit.* p. xiii.

¹¹ *op. cit.* p. xiv, xv, xxiii.

¹² *op. cit.* p. xix, xx, xxiv.

¹³ *op. cit.* p. xvii.

¹⁴ *op. cit.* p. xiv.

¹⁵ *op. cit.* p. xv.

¹⁶ *op. cit.* p. xxiv.

¹⁷ *Current Legal Problems*, Vol. i, 1948. p. 180.

¹⁸ *op. cit.* p. 187.

¹⁹ Cheshire. *Private International Law*. 3rd edition. (1947) p. 397. Professor Cheshire suggests that polygamous marriages should be permitted by statute: *op. cit.* p. 417.

²⁰ Cheshire. *op. cit.* p. 277.

²¹ *In re Paine* [1940] Ch. 46: Professor Cheshire considers that it is the law of the intended matrimonial home which should be applied (*op. cit.* p. 290).

²² Cheshire. *op. cit.* p. 417.

The law of Singapore.

Marriage is monogamous.²³

Singapore Modifications.

In Chinese law, though it has always been a criminal offence for a man to marry more than one principal wife (*ts'i*) and for a woman to marry more than one husband, yet, before May 5, 1931, it was lawful for a man having a principal wife to take a lawful secondary wife or concubine (*ch'ieh*).²⁴

The Court in the Straits Settlements regarded this as polygamy and decided that the Chinese were polygamous. But the Court recognized these polygamous marriages and in doing so modified the law of England.²⁵

The law of China.

As from May 5, 1931, when Book IV of the Civil Code came into force, marriage is monogamous; "a person who has a spouse may not marry again."²⁶

Though it can hardly be expected that the highly popular institution of concubinage will fall into immediate desuetude, in the eyes of the Code the concubine is now merely a mistress to whom no special rights are expressly given.

Capacity.

In general, any unmarried man who has completed the 18th year of his age and any unmarried woman who has completed the 16th year of her age may conclude a marriage.²⁷

There are the following restrictions, however:—

- (a) a minor requires the consent of his or her statutory agent²⁸ (normally the parent);
- (b) it is forbidden to marry²⁹
 - 1. a lineal relative by blood or marriage;
 - 2. a collateral relative by blood or marriage of a different generation, except where the former is beyond the eighth degree of relationship³⁰ and the latter beyond the fifth;
 - 3. a collateral relative by blood who is of the same generation and within the eighth degree of relationship; but this does not apply to cousins bearing a different family name;³¹
- (c) a woman may not remarry until six months have elapsed after the dissolution of her marriage, unless within the six months she has given birth to a child;³²
- (d) a person who on account of adultery has been divorced or sentenced to a criminal penalty may not marry the other party to the adultery.³³

Formalities.

"A marriage must be celebrated by open ceremony and in the presence of two or more witnesses."³⁴ The ceremony may be of any kind, oriental

²³ Cf. the Civil Marriage Ordinance, 1940. A polygamous marriage cannot be concluded before a public official.

²⁴ van der Valk. *An Outline of Modern Chinese Family Law*. (1939). p. 78, 193.

²⁵ *Khoo Hooi Leong v Khoo Chong Yeok*. [1930] A.C. 346, 352. In support of his statement that the Privy Council has recognized the validity of polygamous marriages with "second wives," Professor Cheshire (*op. cit.* p. 403 quotes three cases from the Straits Settlements: perhaps it is not impertinent to emphasize that in the case of the Chinese the so-called "second wife" is not a second principal wife but a lawful secondary wife or concubine.

²⁶ Article 985.

²⁷ Article 980.

²⁸ Article 981.

²⁹ Article 983.

³⁰ Degrees of relationship are calculated as in Roman Law (*van der Valk op. cit.* p. 182).

³¹ van der Valk *op. cit.* p. 79.

³² Article 987.

³³ Article 986.

³⁴ Article 982.

or occidental, secular or religious, but it is essential that there should be some ceremony and that it should be open to the public.³⁵

The Matrimonial Property Regime.

The law of England.

Under the English common law, a husband by 'virtue of marriage, *inter alia* (a) became joint owner of all his wife's freehold property; (b) became entitled to all the rents and profits arising from her lands; (c) became the owner of all her personal property passing by mere delivery of possession.³⁶

English conflict rules.

(1) As regards immoveables, Chinese law is applied to ascertain the rights of the spouses if the immoveables were situated in China.³⁷

(2) As regards moveables; according to the prevalent view, Chinese law governs the rights of the spouses if the husband was domiciled in China at the time of the marriage.³⁸

The law of Singapore.

On this subject the English common law prevailed before the enforcement of the Married Women's Property Ordinance, 1902.³⁹

Singapore modifications.

Before May 5, 1931, according to Chinese law and custom, a woman owned practically no property, and on her marriage took with her only her jewels, clothes, and furniture, but seldom money and never land; any money which she earned went to her husband's family, on which she had a claim. Her husband did not personally acquire any rights over her property by virtue of marriage.⁴⁰

The Court in the Straits Settlements held that a marriage contracted between Chinese according to Chinese rites in the Colony conferred no marital rights on the husband as regards the wife's property.⁴¹

In so holding, the Court modified the rules of the English common law.

The law of China.

As from May 5, 1931, Book IV of the Civil Code introduces provisions under which a wife may hold and dispose of her own separate property.

Husband and wife, before or after marriage, may by written contract adopt as their matrimonial property regime one of the four contractual regimes provided by the Code.⁴²

If they do not make any such contract, then the "statutory regime" is taken as their matrimonial property regime.⁴³

The four regimes are called the "union property regime," the "community of property regime," the "unity of property regime," and the "separation of property regime."⁴⁴

The "statutory regime" is the "union property regime"; this is the Swiss system, which the Central Political Council of the Kuomintang (dictating legislative policy to the *Li Fa Yüan* or Legislative Council) selected as most suitable for China.⁴⁵

³⁵ van der Valk. *op. cit.* p. 82.

³⁶ Halsbury's *Laws of England*. XVI. p. 613-4.

³⁷ Cheshire. *op. cit.* p. 712.

³⁸ Cheshire. *op. cit.* p. 651.

³⁹ Withers Payne. *The Law of Administration of and Succession to Estates in the Straits Settlements* (1932). p. 25.

⁴⁰ Lang. *Chinese Family and Society*. (1946) p. 44. van der Valk. *op. cit.* p. 22, 94.

⁴¹ *Lim Chooi Hoon v Chok Yoon Guan*. (1892) 1 S.S.L.R. 72. Withers Payne. *op. cit.* p. 25-7.

⁴² Article 1004.

⁴³ Article 1005.

⁴⁴ van der Valk. *op. cit.* p. 185.

⁴⁵ van der Valk. *op. cit.* p. 191.

It is impossible here to set out all the rules which govern the rights of the spouses under the various regimes.

It must suffice to say that under the "statutory regime"

(a) the following assets constitute the separate property of the husband or wife⁴⁶:—

1. articles for the exclusive personal use of husband or wife;
2. articles which are essential to the occupation of husband or wife;
3. gifts received by husband or wife, which the donor has declared shall be the separate property of husband or wife;
4. remuneration which the wife obtains for her labour.

(b) husband and wife may by contract stipulate that certain specific property shall be his or her separate property;⁴⁷

(c) property (other than that specified in (a) or (b) above) belonging to the spouses at the time of the marriage and property acquired by them during the continuance of the marriage constitute the union property.⁴⁸

Matrimonial Causes.

The law of England.

The Court has statutory jurisdiction to make decrees, *inter alia*, of nullity, divorce, and judicial separation; but the matrimonial jurisdiction of the Court does not extend to polygamous marriages; the machinery is designed for monogamous marriages only.⁴⁹

English Conflict Rules.

The Court will recognize and give effect to a decree of nullity pronounced by a competent Court in China either (1) if both parties were domiciled in China at the time of the suit,⁵⁰ or (2) if both parties were resident in China at the time of the suit,⁵¹ or, perhaps (3) if the marriage was celebrated in China.⁵²

The Court will recognize and give effect to a decree of divorce pronounced by a competent Court in China if the parties were domiciled in China.⁵³

Some doubt exists as to the position of divorces not by way of judicial process; but since "a letter of divorce" under Jewish Rabbinical law (being a form of divorce permitted in the matrimonial domicile) has been recognized as valid by the Privy Council and would probably be so recognized by the High Court,⁵⁴ it may be presumed that a Chinese divorce by mutual consent would also be recognized if the matrimonial domicile were in China.⁵⁵

The law of Singapore.

In the Straits Settlements the earliest Court of Judicature exercised such jurisdiction as the English Ecclesiastical Courts possessed on November 26, 1826.⁵⁶

On the exact extent of this jurisdiction there was a difference of opinion among the judges in the Court of Appeal.⁵⁷

⁴⁶ Article 1013.

⁴⁷ Article 1014.

⁴⁸ Article 1016.

⁴⁹ Cheshire. *op. cit.* p. 404.

⁵⁰ Cheshire. *op. cit.* p. 463.

⁵¹ Cheshire. *op. cit.* p. 465.

⁵² Cheshire. *op. cit.* p. 463.

⁵³ Cheshire. *op. cit.* p. 479.

⁵⁴ Cheshire. *op. cit.* p. 486-7.

⁵⁵ According to Professor Cheshire (*op. cit.* p. 482), in China a written statement by which two spouses agree to divorce each other may be registered if the parties so desire. he does not quote any authority or state the date at which this rule was in operation: according to van der Valk (*op. cit.* p. 83, 112) divorces must be reported and registered under Article 74 of the Family Registration Act of 1931 which came into force in 1934: at the present day registration of divorces is compulsory under Article 24 of the Family Registration Act of 1946, brought into force in the same year.

⁵⁶ *Meyer v Meyer*. 1927 S.S.L.R. p. 1, 20.

⁵⁷ *Meyer v Meyer*: *supra*.

Statutory jurisdiction was first conferred by the Divorce Ordinance, 1910; it applied only where one party was a Christian. By the Divorce (Amendment) Ordinance, 1939, jurisdiction was conferred in respect of non-Christian monogamous marriages.

Singapore modifications.

Divorce was allowed by Chinese law prior to May 5, 1931. It might be effected (1) by order of Court (2) by mutual agreement between the parties (3) by the unilateral act of the husband.⁵⁸

The Court in the Straits Settlements recognized certain divorces of Chinese: e.g. (1) the divorce by her husband of a secondary wife⁵⁹ (2) the divorce by her husband of a principal wife (apparently).⁶⁰ The Court in the Straits Settlements declined to exercise jurisdiction in matrimonial causes as between parties to a polygamous union;⁶¹ in so doing it acted in conformity with the practice of the English Courts.

The law of China.

Under the Civil Code, husband and wife may effect a divorce themselves by mutual agreement.⁶²

In addition, the Court is granted power to make a decree of divorce on one of ten grounds, viz:⁶³—(1) bigamy,⁶⁴ (2) adultery, (3) such ill-treatment of the spouse as renders co-habitation intolerable, (4) such ill-treatment by the wife of her husband's ascendants or of the wife by her husband's lineal ascendants as renders life in common with them intolerable, (5) desertion, (6) attempted murder of the other spouse, (7) loathsome and incurable disease, (8) serious and incurable mental disease, (9) uncertainty for three years whether the other spouse is alive, (10) sentence of not less than three years' imprisonment, or sentence of imprisonment for an infamous crime.

Further the Court is granted power to annul a marriage on one of nine grounds,⁶⁵ viz. (1) incapacity through being under the minimum age, (2) absence of the statutory agent's consent, (3) existence of the relationship of guardian and ward, (4) bigamy,⁶⁴ (5) marriage with the other guilty party after a divorce or a criminal sentence for adultery, (6) remarriage of an ex-wife within six months of her divorce, (7) incurable incapacity for marital intercourse, (8) mental disorder at the time of marriage, (9) fraud or duress at the time of marriage.

Legitimacy and Legitimation.

The law of England.

Legitimacy is the status of a child born in what English law recognizes as lawful wedlock.⁶⁶

Under the Legitimacy Act, 1926,⁶⁷ legitimation of an illegitimate child might be effected *per subsequens matrimonium*.

English conflict rules.

Judicial dicta indicate that an English Court will recognize the child as legitimate when the child acquires the status of legitimacy according to the law of China, if the child's father was domiciled in China at the time of the child's birth.⁶⁸

⁵⁸ Alabaster. *Notes and Commentaries on Chinese Criminal Law*. (1899). p. 183, 185.

⁵⁹ Wilkinson. *Chinese Family and Commercial Law*. (1921). p. 53, 54.

⁶⁰ *Re Lee Choon Guan, deceased*. [1935] S.S.L.R. 166.

⁶¹ *Nonia Cheah Yew v Othmansaw Merican*. (1861). 1 Ky. 160.

⁶² *Meyer v Meyer*. 1927 S.S.L.R. 14.

⁶³ Article 1049.

⁶⁴ Article 1052.

⁶⁵ The remedy of the first wife is divorce: that of the second "wife" is annulment. (van Valk. *op. cit.* p. 86.)

⁶⁶ Articles 989-997.

⁶⁷ Cheshire. *op. cit.* p. 498-9.

⁶⁸ 16 and 17 Geo.V.c.60.

⁶⁹ Cheshire. *op. cit.* p. 499.

Legitimation not under the Legitimacy Act is only effective in English law and will only be recognized if (1) the child is capable of being legitimated by the law of the domicile of the putative father at the time of the child's birth, and (2) the legitimation was valid, at the time when it is alleged to have occurred, by the law of the country in which the putative father was then domiciled.⁶⁹ Thus the Court will have to take the law of China into consideration if the putative father was domiciled in China at the time of the child's birth, or at the time when the legitimation is alleged to have occurred.

The law of Singapore.

In the law of the Straits Settlements, being the law of England as on November 26, 1826, there was no provision which rendered possible the legitimation of an illegitimate child.⁷⁰

Singapore Modifications.

Before May 5, 1931, according to Chinese law a child born before his parents were married or entered into a valid polygamous union was legitimized by such union.⁷¹

In the Straits Settlements the Court recognized such a child as legitimate because the question is "one which must be determined with regard to the validity of the union of his parents and the rights and obligations governing that union under the institution of marriage, according to the religion and usages of the Chinese with reference to which alone the parties to the union must be deemed to have contracted."⁷²

In so doing the Court modified the law of England. On the other hand, the Court held that the Chinese custom of legitimation of a natural son by subsequent recognition must be rejected as "unknown and repugnant to the common law of England."⁷³

In so holding the Court rejected the Chinese custom and followed the English law without modification.

The law of China.

In the Civil Code, a "wedlock-born child" or legitimate child is defined as one whose conception results from the relation of marriage:⁷⁴ and where the wife conceived during the continuance of a marriage, it is presumed that the child so born is legitimate, but this presumption may be rebutted by a judgment of the Court.⁷⁵

Further, a child who is not a "wedlock-born child" is deemed to be legitimate in the following cases: (1) when the child's natural father and mother have been married to each other,⁷⁶ (2) when the child has been acknowledged by the natural father.⁷⁷

In the latter case the child is regarded as legitimate from the time of birth.⁷⁸

Thus the Chinese legislator has ingeniously contrived that a Chinese man may become the father of a legitimate child without being married.

Adoption.

The law of England.

The status of relationship arising from adoption was unknown to English law.⁷⁹

⁶⁹ *In re Luck*. [1940] Ch. 864. Professor Cheshire considers the decision incorrect (*op. cit.* p. 521).

⁷⁰ Cheshire. *op. cit.* p. 514.

⁷¹ *In the Matter of the Estate of Choo Eng Choon, deceased*. (1911). 12 S.S.L.R. 120, 121.

⁷² *In the Matter of the Estate of Choo Eng Choon, deceased*. (1911). 12 S.S.L.R. 120, 224.

⁷³ *Khoo Hooi Leong v Khoo Chong Yeok*. [1930] A.C. 346, 356.

⁷⁴ Article 1061.

⁷⁵ Article 1063.

⁷⁶ Article 1064.

⁷⁷ Article 1065.

⁷⁸ Article 1069.

⁷⁹ Halsbury's *Laws of England*. XVII. p. 679.

English conflict rules.

There are no decided cases regarding the validity of foreign adoptions. In principle, a foreign adoption, in order to attract extra-territorial validity, should be valid according to the law of the domicil of both the adopter and the adopted person at the date of the adoption.⁸⁰

The rights and liabilities incidental to the status should, in general, be tested by the law of the adopter's domicil at the date of the adoption.⁸¹

Apparently, then, the Court will take the law of China into consideration if either the adopter or the adopted person was domiciled in China at the date of the adoption.

The law of Singapore.

In the law of the Straits Settlements, being the law of England as on November 26, 1826, the status of adoption was unknown.

Singapore modifications.

According to Chinese law and custom as in force prior to May 5, 1931, an adopted son acquired the rights of a natural-born son in his adopted family.⁸²

The Court of the Straits Settlements decided that the circumstances were not sufficiently grave to call for the modification of English law.⁸³

Thus the Court applied the law of England without modifying it.

The law of China.

Under the Code, a married or unmarried person may adopt a son or daughter who is at least twenty years younger.⁸⁴

The adoption must be effected in writing, unless the person to be adopted has been brought up as a child of the adopter since infancy.⁸⁵

The relation between the adopted child and the adoptive parents is the same as that between a legitimate child and his or her parents, unless the law otherwise provides.⁸⁶

The relation may be terminated by mutual agreement effected in writing.⁸⁷

In addition, the Court may in certain circumstances terminate the relation by judicial order.⁸⁸

*Succession.**The law of England.*

In so far as it is relevant to the subject matter of this paper, the English law of intestate succession is contained in the "Statute of Distributions."⁸⁹

One draws attention to the following points:—

1. a widow was entitled to one-half of her deceased husband's estate if there were no children; if there were children or lineal descendants of children, she was entitled to one-third;⁹⁰
2. subject to the rights of the husband or widow if alive, female children shared equally with male children;⁹¹
3. next-of-kin, however remote, shared in the estate;⁹¹
4. if an intestate died without leaving any next-of-kin, the Crown was entitled to the estate as *bona vacantia*;⁹¹
5. since neither adoption nor legitimation could be effected under English law, children purporting to be adopted or legitimated had no right to share.⁹²

⁸⁰ Cheshire. *op. cit.* p. 524.

⁸¹ Cheshire. *op. cit.* p. 525.

⁸² Jamieson. *Chinese Family and Commercial Law.* (1921). p. 21.

⁸³ *Khoong Tiang Bee et uxore v Tan Beng Gwat.* (1877). 1 Kyshe. 413.

⁸⁴ Articles 1073-4.

⁸⁵ Article 1079.

⁸⁶ Article 1077.

⁸⁷ Article 1080.

⁸⁸ Article 1081.

⁸⁹ 22 and 23 Car. II c. 10.

⁹⁰ Halsbury's *Laws of England.* X. p. 599.

⁹¹ *op. cit.* p. 604.

⁹² Cf. Halsbury's *Laws of England.* X. p. 583, 584.

English conflict rules.

To determine the right of succession to immoveables, the Court applies Chinese law if the immoveables were situated in China.⁹³

To determine the right of succession to moveables, the Court applies Chinese law if the intestate was domiciled in China at the time of his death.⁹⁴

Where there are no relatives entitled, it would seem that, if the intestate's property was situated in China, Chinese law, as being the *lex situs*, would be applied to determine rights concerning *bona vacantia*.⁹⁵

The law of Singapore.

The Court held that in the case of a Chinese domiciled in the Straits Settlements the Statute of Distributions provided the only rules to be applied in the distribution of his estate.⁹⁶

Singapore modifications.

The main rules of succession, according to Chinese law and custom in force prior to May 5, 1931, may be summarized as follows:—

1. all sons shared equally in the estate, whether they were born of a principal or a secondary wife, and whether they were natural born or adopted;⁹⁷
2. daughters were excluded from the inheritance;⁹⁸
3. the widow, being a principal wife, had no share in the estate, but she was amply cared for by her deceased husband's family;⁹⁹
4. secondary wives had no share in the estate;¹⁰⁰
5. if there were no male successors, the daughters (or, failing daughters, the nearest females of the kindred) were entitled to the father's estate;¹⁰¹
6. if there were no females of the kindred, the property was forfeited to the State; but forfeiture was perhaps never insisted upon against relations of any kind, by consanguinity or affinity.¹⁰¹

The Straits Settlements Court modified the law of England in holding:—

1. that the widows, whether principal or secondary, were entitled to divide equally amongst them the one-third share which the Statute gave to the widow;¹⁰²
 2. that children legitimated *per subsequens matrimonium*, according to Chinese law were legitimate and entitled to share in the two-thirds share which the Statute gave to the children.¹⁰²
- The Court applied the law of England and rejected the Chinese law and custom in holding:—
1. that females had equal rights of succession with males;¹⁰³
 2. that adopted children had no right of succession.¹⁰⁴

The law of China.

The Code allows any person (except incapables) who has completed sixteen years of age to make a will;¹⁰⁵ and, if he has no lineal descendants by blood, he may by will designate a successor to the whole or any part of his property, provided that the legal requirements as to "specially reserved portions" or compulsory portions (see below) are not contravened.¹⁰⁶

⁹³ Cheshire. *op. cit.* p. 732.

⁹⁴ Cheshire. *op. cit.* p. 678.

⁹⁵ Cf. Cheshire. *op. cit.* p. 679.

⁹⁶ *Lee Joo Neo v Lee Eng Swee.* (1887). 4 Kyshe. 325.

⁹⁷ Jamieson. *op. cit.* p. 21, 25.

⁹⁸ Jamieson. *op. cit.* p. 25.

⁹⁹ Jamieson. *op. cit.* p. 25.

¹⁰⁰ Alabaster. *op. cit.* p. 578.

¹⁰¹ Jamieson. *op. cit.* p. 30.

¹⁰² *In the Matter of the Estate of Choo Eng Choon, deceased.* (1911) 12 S.S.L.R. 120.

¹⁰³ *Lee Joo Neo v Lee Eng Swee.* (1887). 4 Kyshe. 413.

¹⁰⁴ *Khoong Tiang Be e et uxore v Tan Beng Gwat.* (1877). 1 Kyshe. 413.

¹⁰⁵ Article 1186. Before the Code came into force, it was impossible to bequeath property by will under the Chinese law (Jamieson. *op. cit.* p. 30).

¹⁰⁶ Article 1143.

If he makes no will, the main rules regarding succession may be summarized as follows:—

1. The successors to property (other than the spouses) fall into four ranks
 - i lineal descendants by blood of either sex,
 - ii parents,
 - iii brothers and sisters,
 - iv grandparents.¹⁰⁷
2. Among successors of the first rank, the person nearest in degree of relationship comes first as successor ¹⁰⁸ (e.g. a daughter comes before a grandson).
3. When a successor of the first rank dies or loses his right of succession before the death of the deceased, his lineal descendants inherit his successional portion in his place.¹⁰⁹
4. Where there are several successors of the same rank, each individual takes an equal share, unless the law otherwise provides.¹¹⁰
5. An adopted child stands in the same rank as a legitimate child; if the adoptive parents have any lineal descendant by blood for their successor, the successional portion of an adopted child is one-half of that of a legitimate child; if they have not, it is the same as that of a legitimate child.¹¹¹
6. Either spouse has the right of succession to the estate of the other spouse;¹¹² the successional portion of the spouse is
 - i if he or she takes concurrently with successors of the first rank, a share equal to that of each other successor,
 - ii if he or she takes concurrently with successors of the second or third rank, one-half of the estate,
 - iii if he or she takes concurrently with successors of the fourth rank, two-thirds of the estate,
 - iv if there is no successor of the four ranks, the whole of the estate.
7. If the estate is not claimed by the spouse or by a successor in one of the above-mentioned ranks, the balance, after payment of debts and legacies, accrues to the Treasury.¹¹³
8. The compulsory portions are fixed as follows¹¹⁴:—
 - i for a lineal descendant by blood, for a parent, or for a spouse, it is one-half of his or her successional portion,
 - ii for a brother or sister or grandparent, it is one-third of his or her successional portion.

Addendum.

One feature of the Chinese legal system, it is suggested, merits the attention of English lawyers; namely, the power given by the Constitution¹¹⁵ to the *Ssu Fa Yüan* or Judicial Council "to unify the interpretation of laws and orders."

Under the rules which regulate the exercise of this power, every public officer may formulate an abstract question of law on a matter within his jurisdiction and request the Council to interpret the relevant law or order.

The President of the Council convenes a formal meeting attended by himself and the presiding Judges of the Supreme Court, and an authoritative interpretation is propounded. These interpretations are published.¹¹⁶ Obviously such a system has its advantages: if the Government of the day is not satisfied that the interpretation coincides with the intention of the Legislature, it can

¹⁰⁷ Article 1138.

¹⁰⁸ Article 1139.

¹⁰⁹ Article 1140.

¹¹⁰ Article 1141.

¹¹¹ Article 1142.

¹¹² Article 1144.

¹¹³ Article 1185.

¹¹⁴ Article 1223.

¹¹⁵ Article 78.

¹¹⁶ Escarra. *Le Droit Chinois*. (1936). p. 284-6.

procure the passage of amending legislation: if it is satisfied, "the inferior tribunals and the rights of the Queen's subjects" are not left in a state of uncertainty—an important desideratum which provides the justification for the House of Lords' claim to judicial infallibility.¹¹⁷ To English Courts an abstract question of law is anathema: they refuse to adjudicate if there is "no real issue before the court and no lis between the parties."¹¹⁸

In England it seems that uncertainty arises and persists for two reasons: first, it is nobody's business to see that the inferior tribunals and the King's subjects are not left in a state of uncertainty; secondly, since a suit must first be brought in the lowest competent Court, an indefinite time may elapse before an uncertain point of law is finally decided by the highest Court.¹¹⁹

The principle of consulting the Judges on a point of law is well recognized in the English legal system: two instances will show this: (a) the House of Lords may order the Judges of the Supreme Court to be present for any purpose for which it may require their assistance, and it may address to them any question of law, even though it does not arise out of an appeal actually before the House,¹²⁰ (b) the Home Secretary, on the consideration of any petition for the exercise of His Majesty's mercy after a conviction on indictment, may refer any point arising in the case to the Court of Criminal Appeal for their opinion thereon.¹²¹

Since the Chinese system makes for both expedition and certainty, it seems worth while considering whether it is practicable to formulate machinery whereby a tribunal of supreme authority may give a final interpretation of equivocal legislation.

Maybe the use of the unconventional weapons would be justified in order to defeat the lawyer's bogey, Uncertainty, and to spare the King's subjects from the expense and protracted anxiety which normally attend an appeal to the highest Court: if one may play with Virgil, "*parcere subjectis et debellare Incertum.*"

TRUSTS IN SCOTTISH LAW

[Contributed by PROFESSOR R. CANDLISH-HENDERSON]

THE author of the earliest treatise on the Scottish Law of trusts declares that these are coeval with the Common Law, but there is no evidence as to their origin. In the 17th century landowners about to engage in enterprises which might lead to the forfeiture of their estates found in the device of a "proper trust," as Stair, in his *Institutes* published in 1681, terms it, a means of security against that risk; in this form of trust the landowner disposed his estate in *ex facie* absolute terms in the confidence that when the risk was past the donee would reconvey the estate. Stair declares that such trusts were frequent "and fraud is ordinarily" in them. Hence, at the instance of the Court, Parliament passed the Act of 1696, Cap. 25 (still in force), by which in a question between an alleged truster and trustee the trust can be proved only by the writ or oath of the alleged trustee. Stair notes the constituent features of trust, but his treatment of the subject is very brief and this is so also in Erskine's *Institutes* (1773). In the first edition of the authoritative juridical styles issued under the auspices of the leading professional body in 1787 the forms of marriage contract and testamentary deeds appear almost entirely without any appointment of trustees. Not until Bell's *Commentaries*, published in the opening years of the

¹¹⁷ *Bright v Hutton*. (1852). 3 H.L.C. 341, 392.

¹¹⁸ *Sutch v Burns*. [1944] 1 K.B. 406. Mrs. Sutch, the plaintiff, suing in respect of her husband's death, lost her suit because the defendant had made a concession (thus creating a hypothetical case). She probably holds a poor opinion of the English legal system.

¹¹⁹ The questions of law referred to in Notes 4, 21 and 69 above have remained uncertain for 17 years, 8 years and 8 years respectively.

¹²⁰ Halsbury's *Laws of England*. XXIV. p. 210.

¹²¹ Criminal Appeal Act, 1907. (7 Ed. VII. c. 23). Section 19.

last century, is any detailed treatment of trusts to be found; and it is from this period that the modern Scottish law of trusts and trust administration has been built up. In this development the Courts were influenced, in the absence of native authority, by the body of principles to be found in the decisions of the English Courts of Chancery. From 1861 onwards a series of statutes were enacted for the purpose of facilitating the administration of trusts, but these have all been repealed by the Trusts Scotland Act, 1921 (11 and 12 George V, Cap. 58) hereinafter referred to as "the Act," which consolidates the provisions of these Acts and adds further provisions enlarging the powers of trustees in the administration of the trust estate.

Parties to a Trust.—A trust may be constituted in one or other of two forms. There may be a trust of the kind noticed above in which the disposition to the trustee is *ex facie* in unqualified terms, the trust purposes, which are usually of a temporary or special nature, appearing in a separate document granted by the disponent. In this case the disponent (truster) has no more than a right to require a re-conveyance of the subjects in so far as they have not been required for, or exhausted by, their application to the trust purposes. The more common form is that in which the trust purposes appear in the disposition in favour of the disponent. Here the truster is divested of his right as proprietor only in so far as is necessary for carrying out the trust purposes; he retains the "radical right," in virtue of which, if the trust purposes fail of effect in whole or in part, or do not exhaust the trust funds, any portion thereof not disposed of may be claimed by the truster as property of which he has never been divested.

The "property of the thing," as Stair points out, "be it in land or in moveables, is in the person intrusted, else it is not proper trust." The trustee has the whole rights of *dominium* and the full *jus disponendi* over the subjects; and as proprietor is liable to all the charges and burdens affecting the property with recourse against the trust estate.

As regards the beneficiary under the trust (*cestui qui trust*) his right has always been regarded as a *jus crediti*. This right is heritable or moveable according to the nature of the property to which it relates and the directions of the truster; and it may be assigned by the beneficiary and can also be attached by his creditors.

The Jurisdiction of the Court.—The Scottish Courts, differing in this respect from the English Courts, never assume the administration of a trust. "There is a difference between the course of the Courts in England and Scotland respectively as to the grounds which are held sufficient for a general judicial administration at the instance either of fiduciaries or of beneficiaries. The Court of Session will not in either case interfere with the administration *extra curiam* except for some special cause shewn. The English Court, on the other hand, regards the mere exoneration of fiduciaries from the risks and responsibilities of an administration *extra curiam* and the better security for the interests of beneficiaries afforded by a judicial administration, as sufficient reasons (generally) for its intervention." The principle on which the Scottish Courts have always proceeded is that the administration should be left where the truster has placed it, unless from fault or accident the trust has become unworkable. So averse were the Courts from any interposition in the administration of a trust that they refused to give advice or guidance to trustees in any question as to the course of action they ought to follow. This self-imposed limitation of the power of the Court was felt to be unfortunate by many in the legal profession, and the provision giving the desired power to the Court is conferred by Section 17 (VI) of the Administration of Justice (Scotland) Act, 1933 (23 and 24 Geo. V, Cap. 41), and the Rules of Court (1948), Chap. IV, Section 6. This section makes it competent for trustees to apply to the Court "for direction on questions relating to the investment, distribution, management or administration of the trust estate under their charge or as to the exercise of any power vested in, or as to the performance of any

duty imposed on, them;" but it cannot be said that the attitude of the Court to this section has encouraged resort to the prescribed procedure.

The Court of Session as part of its common law jurisdiction exercises an equitable jurisdiction known as the *nobile officium*. The extent of this jurisdiction has never been defined; it is illustrated by the cases in which it has been exercised, but it is not limited to these or similar cases. The most frequent occasion for its exercise is in regard to charitable or public trusts. In other trusts there are reported cases in which trustees were appointed by the Court when all those nominated by the testator had died or declined; trustees guilty of malversation were removed from offices; advances to beneficiaries were authorised where the testator had failed to authorise these; and, where a trust proved unworkable the appointment was made of a judicial factor, an officer of Court, who as such could come to the Court for instructions. The *nobile officium* also enables the Court to exercise "wide powers for the rescue of a plan of testamentary disposal from inherent conditions which make it unworkable or which tend to defeat its own purpose." But there is no tendency to extend the *nobile officium*, and it is not exercised "except in cases of necessity or strong expediency and where the ordinary procedure provides no remedy."

Recourse to it is now not so likely to be required since the enactment of the Trusts Acts, for in these statutory authority has been given for the exercise by the Court of those powers which had most commonly been sought in an application to the *nobile officium*. Thus Sections 16, 22 and 23 of the Act provide for the appointment and removal of trustees and for authority to make advances to beneficiaries; and Section 17 empowers trustees to apply to the Court for an order on the Accountant of Court to superintend the administration of the trust "in so far as it relates to the investment of the trust funds and the distribution thereof among the creditors interested and the beneficiaries under the trust." Where this appointment is made, the Accountant annually examines and audits the trust accounts and may, when he thinks fit, seek the directions of the Court.

Administration of Trusts.—In Scottish trusts the recognised practice is that a solicitor is appointed to conduct its business under the directions of the trustees. He acts for the trustees in the legal business of the trust, and he is the custodian of the trust documents. A record of the transactions and decisions of the trustees is preserved in the Minutes of the trustees' meetings and these are recorded in the Sederunt Book of the trust.

Under the Common Law trustees could act by a majority, and it is now provided by Section 3 of the Act that all trusts shall be held to include, unless the contrary be expressed, a provision that a majority of the trustees accepting and surviving shall be a quorum. The acts of a quorum in a due course of administration of the trust bind the trust estate and all the trustees as such; but the Court has been careful to point out that this does not mean that a quorum may proceed in the trust administration without consulting the remaining trustees.

Certain principles governing the administration of trusts and the duties of trustees are so well established that no more than a brief reference to them need be made. A trustee may not be *auctor in rem suam*. He is not permitted to retain any profit which comes to him by reason of his position as trustee, and he cannot accept remuneration for acting in the trust unless this is authorised by the trustor or by all the beneficiaries; hence, if the trustee is a partner of a legal firm which has done business for the trust, no charge for this can be made by the firm. Further, without such authority, a trustee may not enter into any transaction with the trust in which his personal interest may come into conflict with his duty as a trustee; all such transactions may be reduced and no inquiry into the merits of the transaction is necessary or permitted.

The powers which a trustee may exercise are now to be found in the directions in the trust deed and the Act. At Common Law the powers exercisable

by trustees were very limited. He might not, for example, sell any part of the heritable property of the trust unless this power was given him by the truster or the beneficiaries or was necessary in order to the due administration of the trust. An Act of 1867 enabled trustees to obtain a power of sale from the Court; and now under Section 4 of the Act all trustees have power to sell, grant leases of any duration of, heritable property and to borrow money on the security of the trust estate where these powers are not "at variance with the terms and purposes of the trust" and, where there is such variance, the Court is nevertheless empowered under Section 5 to grant authority for their exercise "on being satisfied that such act is in all the circumstances expedient for the execution of the trust." In exercising their powers of investment of trust funds trustees are limited to those mentioned in the trust deed and those specified in Sections 10-13 of the Act. These sections specify certain stock and loans in any of which trustees may, "unless specially prohibited by the conditions or terms of the trust" invest the trust funds. Section 30 protects trustees (if certain conditions as to valuation are observed) who invest money on heritable securities from liability for breach of trust "by reason only of the proportion borne by the amount of the loan to the value of the" property, provided the loan does not exceed two-thirds of that value.

The Duties and Liabilities of Trustees.—At one time a trustee could not be made liable for any fault or error in the administration of the trust unless it was proved that he had been guilty of "very gross culpability." But under the influence of decisions of the House of Lords the standard of care required of trustees has become more strict. The criterion now accepted (which has been criticised in the Court of Session as "severe and unjust") is that the trustee must act with that degree of diligence in the execution of his office which a man of ordinary prudence would exercise in the management of his own private affairs. If a trustee's conduct in the trust falls below this standard, he may be made personally liable by the beneficiaries for any loss thereby occasioned to the trust estate. Where the fault relates to the investment of the trust funds the remedy of the beneficiaries will depend on the type of investment. If the investment is one authorised by the truster or the Act, the trustee's liability is in damages for the loss sustained through his breach of duty. On the other hand if the investment was one which was unauthorised, the beneficiaries may either adopt it, or, if they do not, may compel the trustee to replace the amount invested with interest thereon. For the protection of trustees against claims in respect of failure of duty on their part a clause of indemnity is frequently inserted in the trust deed. But such clauses will not protect trustees who have acted in plain violation of their duty or have been guilty of gross negligence or bad faith; and in the reported decisions such clauses have not been found of much service to the trustees. Two statutory provisions are also designed for the protection of trustees. If a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may apply the share of that beneficiary for the indemnification of the trustee; and further, if it appears to the Court that despite a breach of trust the trustee has acted honestly and reasonably, the Court may relieve the trustee of personal liability (Act, Sections 31 and 32). In both cases it is a matter for the discretion of the Court whether a trustee shall have the benefit of these enactments.

AUTOMOBILE ACCIDENT INSURANCE LEGISLATION IN THE PROVINCE OF SASKATCHEWAN

[Contributed by J. GREEN, ESQ.]

THE Automobile Accident Insurance Act, 1946, amounted to a rejection of the traditional principle that the liability for loss or damage resulting from a motor vehicle accident should be imposed upon him who is judicially found to have been at fault. The inter-departmental committee, upon whose recommendations

this Act was introduced by the Government of Saskatchewan, reported that although it recognized the tremendous value of the rule of negligence in the regulation of affairs in a democratic society, the process of its application to motor vehicle accident cases is found wanting. This view was taken earlier in the Report by The Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932). That Committee had pointed out that a jury renders its verdict after listening to witnesses testifying in minute detail to facts which existed for only a split second of time. Such testimony is obviously, except in a small minority of cases, the result of what the witness, upon reflection, assumes must have happened, the result of conversation with others, and coaching by his solicitor during preparation of the case. This unreliability of witnesses and the delay and expense involved in bringing an issue to trial, seem to be the chief reasons for the Columbia group concluding that the moral value of establishing liability according to fault is lost in the practical application of the rule. That Committee also pointed out that settlements are made out of all proportion to the loss sustained, for, on the one hand, an injured person in impecunious circumstances readily agrees to a ridiculously low settlement, and, on the other hand, an insurance company, representing a motorist, must often agree to a high settlement out of all proportion to a slight injury in order to save the time and expense involved in litigation. The Columbia group proposed an extension of the principles of the workmen's compensation law to motor vehicle accidents. Under the plan, a motor vehicle owner would be liable, without regard to fault, to pay compensation according to a fixed scale to any person suffering injuries or death caused by the operation of that motor vehicle, and the owner should be required to insure against this liability.

The Saskatchewan committee also expressed the view that, because of the human factor, accidents resulting in injuries and property damage are indigenous to the presence of motor vehicles on the highway; that every motorist is, at some time, guilty of inadvertence or mistaken judgment; that it is only a matter of chance that such inadvertence should occur at a time when some other person is in a position to suffer as a result of it, and that the losses resulting from such accidents ought to be the collective responsibility of the motoring public and borne as a cost of operation. This committee consequently carried the proposals of the Columbia group a step further and recommended that the principle of the Workmen's Compensation (Accident Fund) legislation be applied to motor vehicle accidents and that motorists should be collectively responsible for a minimum of compensation to those persons suffering loss from personal injuries as the result of a motor vehicle accident. The compensation was not, at first, to be a complete substitute for damages, but merely a means of lessening the economic loss to those suffering the injuries. It later became necessary to supplement this legislation with liability insurance features, for reasons which will later appear.

The object of The Automobile Accident Insurance Act, 1946 (Chapter II of the statutes of 1946) was to ensure to every person (with certain specific exceptions) a minimum of compensation for loss from bodily injuries or death caused by motor vehicle accidents on the highways of the Province of Saskatchewan and the benefits of the Act were also extended to provide the same compensation with respect to residents of the Province involved in motor vehicle accidents elsewhere in North America (except Mexico) under specified circumstances.

In 1947, the legislature extended the provisions of the Act to provide insurance to every person registered with the The Highway Traffic Board as the owner of a motor vehicle in the Province, against loss or damage to his motor vehicle and its equipment caused by accidental collision or accidental upset, occurring in Canada, Newfoundland or the United States of America or on a vessel plying between ports in those countries. This feature, together with other desirable amendments to the 1946 legislation, led to a new statute, The Automobile

Accident Insurance Act, 1947 (Chapter 15, 1947), in which the provisions dealing with compensation for bodily injuries and death, hereafter and in the statute referred to as "accident insurance," appear as Part II and the "collision insurance" provisions appear as Part III. A further feature was introduced in 1948 (Chapter 15, 1948) when Part IIIa was added to provide insurance to the registered owner of each motor vehicle registered in the province (and anyone operating the vehicle with his consent) against the liability imposed by law arising out of the use, operation, maintenance or ownership of the vehicle anywhere in Canada, Newfoundland or the United States of America or on a vessel plying between ports in those countries resulting from bodily injuries or death to others (public liability insurance) or damage to property of others (property damage insurance). In 1949, Parts IIIb and IIIc were added. (Chapter 11, 1949.) Part IIIb insures the owner of each motor vehicle registered in the province against loss or damage to his vehicle and its equipment caused by fire and certain transportation perils while Part IIIc insures him against loss or damage to his vehicle and its equipment caused by theft or attempted theft. These two Parts, IIIb and IIIc, also cover losses occurring anywhere in Canada, Newfoundland, the United States of America or on vessels plying between ports in those countries. It is with The Automobile Accident Insurance Act, 1947, and its amendments that this article will concern itself, reference being made to the 1946 Act only where necessary for the purposes of elucidation.

Insurance under the Act is carried in the form of a separate and distinct fund, on a non-profit basis, by The Saskatchewan Government Insurance Office, a crown corporation originally established under The Government of Saskatchewan Insurance Act, 1944 (Chapter 13, 1944, Second Session), to carry on a general insurance business on behalf of the Crown in right of the Province.

Before the motor vehicle or trailer of a resident or person carrying on business in the province may be registered by The Highway Traffic Board to permit its use on a highway in the province, the owner must furnish evidence that his application for an owner's certificate of insurance under the Act has been accepted and that he has paid the basic "premium" therefor. Similarly, no person may obtain a licence to drive any motor vehicle in the province unless his application for an operator's certificate of insurance has been accepted and he has paid the basic "premium" therefor: S. 3 (1). Motor vehicles registered for use in the province by the Dominion Government are excepted: S. 3 (2). To facilitate the process, all persons appointed to accept applications for certificates of registration and drivers' licences on behalf of The Highway Traffic Board are authorized to accept applications and basic "premiums" for certificates of insurance on behalf of the "insurer": S. 13 of the Regulations (O.C. 427/48).

Basic premium rates are fixed annually for each class of vehicle and driver by Regulation of the Lieutenant Governor in Council: S. 5 (1). Thus, for example, in the licence year 1949-50, the basic premium for a private passenger automobile of year model prior to and including 1932 is \$4.50 and for a private passenger automobile of model year later than 1942, \$10.00: Schedule A to the Regulations (O.C. 2113/48).

The "insurer" may, however, require any applicant to pay an additional premium before approving an application: S. 6 (1). This freedom of action is limited to some extent by S. 14 of the Regulations. That regulation provides that the issue of a certificate shall not be withheld merely on the ground that the applicant is suffering from a physical handicap unless the defect is severe enough for The Highway Traffic Board to refuse to issue a licence. (In this case, of course, the applicant would not be able to obtain a certificate under the Act at any event.) Where the applicant would be able to procure a licence despite his handicap, a certificate of insurance is issued to him on payment of the basic premium but he is required to complete a supplementary application form which gives additional information with respect to the handicap (S. 15 of the Regulation). If, on reviewing the application, the "insurer" deems it advisable

to impose a surcharge, then it may proceed under sub-section (2) of section 6 of the Act which provides that an additional premium may be imposed at any time after the issue of a certificate where it is considered that the presence of any person on the highway as the owner or driver of a motor vehicle is unduly dangerous to the public. The "insurer" may determine all questions of fact in matters arising under section 6 and the amount of any surcharge, but any person aggrieved by the "insurer's" decision may appeal to the Rates Appeal Board (S.7).

The Rates Appeal Board consists of one or more members, appointed by the Lieutenant Governor in Council: S.8 (1). The jurisdiction of this Board extends to the hearing and determination of appeals against the assessment of additional premiums under Section 7, and no appeal lies from a decision of the Board: S. 8 (2). Notice of appeal to the Board must be filed with the Chairman or any member of the Board within fifteen days of the date upon which notice of surcharge has been mailed by registered post by the "insurer" and no appeal may be taken after the expiration of the fifteen day period without special leave of the Board: S. 8 (3). Any appeal to the Board is considered to be an administrative review and the Board may confirm the additional premium assessment or reduce or increase or otherwise vary it: S. 8 (4). No certificate of registration, licence or permit for a vehicle, chauffeur's licence, operator's licence, or permit to drive may be issued or renewed under The Vehicles Act, 1945, while an appeal is pending before the Board unless the amount of the additional premium has been paid, subject to refund if the appeal is successful: S. 8 (5). The appropriate form for giving notice of appeal is mailed by the "insurer" together with the notice of surcharge and the motorist's rights are clearly set out in the documents. Upon receipt of a notice of appeal, the Chairman of the Rates Appeal Board attempts to arrange a time and place of hearing which will least inconvenience both the motorist and the representatives of the "insurer". Evidence on the hearing may be *viva voce* or by affidavit.

Section 9 requires that whether or not appeal is taken to the Rates Appeal Board, the amount of any surcharge must be paid within fifteen days after the mailing by registered post of the notice of surcharge. In case of default, the "insurer" must file a certificate of such default with The Highway Traffic Board and that Board is required to suspend forthwith the right to drive of the defaulter or to have a vehicle registered in his name, depending upon whether he makes the default as a driver or as an owner. The suspension remains in effect until The Highway Traffic Board receives notification from the "insurer" that the default has been remedied. If a successful appeal is taken to the Rates Appeal Board, the amount of any surcharge premium paid by the appellant is returned to him.

As the "insurer" has no freedom to "select risks" in the usual sense of that phrase, it must rely almost exclusively upon the surcharging technique to control carelessness among motorists. It may recommend to The Highway Traffic Board the suspension or cancellation of any certificate of registration or driver's licence (S 52), but licences can only be directly suspended or cancelled by The Highway Traffic Board or, in the event of a conviction for specified traffic offences under The Vehicles Act or under Section 285 of the Criminal Code of Canada, by the Court. Since, however, any person who drives his vehicle in a manner or for a purpose constituting an offence under the Criminal Code is precluded from benefiting from the Act, the strain on the use of the surcharge to protect the fund from depletion by abnormal risks is not so great as may at first appear.

When a motor vehicle owner's certificate of registration is revoked, suspended or cancelled under any law, his owner's certificate of insurance is automatically revoked, suspended or cancelled: S. 11 (1). When a driver's licence is revoked, suspended or cancelled under any law, his operator's certificate of insurance is automatically revoked, suspended or cancelled: S. 11 (2). When the holder of a certificate of insurance ceases to reside or to carry on business in Saskatchewan,

so that he is no longer required to register his motor vehicle in the province or to hold a Saskatchewan licence to drive, his certificate of insurance ceases to be valid: S. 11 (3) (S. 3, Chapter 15, 1948). Irrespective of the date of its issue, unless earlier revoked, suspended or cancelled, a certificate of insurance expires at midnight on the 31st day of March of the licence year for which it is issued. Operator's certificates of insurance thus expire at the same time as drivers' licences and owners' certificates of insurance expire at the same time as certificates of registration for vehicles. A certificate of insurance may not be transferred from one person to another. An owner may, however, exchange a certificate covering one vehicle for a certificate to cover another vehicle owned by him whether the latter vehicle is in the same class as the former or not. In that event, he is credited with the *pro rata* "premium" for the unexpired term of the former certificate and charged a *pro rata* "premium" for the period in which the latter certificate will be in force: S. 10 and Schedule C of the Regulations (O.C. 427/48, Am. O.C. 2113/48).

Upon surrender of his licence plates to The Highway Board, an owner may obtain a refund of the amount by which the "premium" actually paid by him with respect to his owner's certificate exceeds the "short rate premium" for the period during which the certificate has been in force: Section 5 and Schedule B to the Regulations (O.C. 427/48).

Highway traffic authorities advise that the insurance requirement has not affected the extent to which persons attempt to evade the licensing and registration laws. There were, for example, approximately 165,000 vehicles registered in the Province for the licence year 1948-49 and only 259 persons were convicted for operating vehicles which were not registered in the name of the owner.

The Automobile Accident Insurance Act, 1947, today provides insurance against a comprehensive range of perils but the accident insurance benefits provided by Part II remain the important feature of the legislation. Subsection (1) of Section 16 refers to the persons and perils to whom and against which insurance is provided within Saskatchewan. It provides as follows:

"16.—(1) Subject to the provisions of this Act, every person is hereby insured in the amounts hereinafter specified against loss resulting from bodily injuries sustained by him directly, and independently of all other causes, through accidental means, excluding suicide while sane or insane or any attempt thereat while sane or insane, provided that such bodily injuries are suffered as a result of:

- (a) driving, riding in or on, or operating a moving motor vehicle in Saskatchewan; or
- (b) collision with or being struck, run down or run over by a moving motor vehicle in Saskatchewan."

The phrase "run down" has been interpreted by the "insurer" to include those accidents where, although there is no actual impact with a motor vehicle, injuries are sustained as the result of a person attempting to avoid a collision which has become imminent.

Subsections (2) and (3) of Section 16 refer to the persons and perils to whom and against which insurance is provided outside Saskatchewan and are in the following terms:

"16.—(2) Subject to the provisions of this Act, an owner's certificate shall further insure:

- (a) the person named therein who, being domiciled in Saskatchewan, is riding in or on the vehicle designated therein if it is being operated by a person qualified and authorized by law to drive a motor vehicle; and
- (b) Any other person who, being domiciled in Saskatchewan, is riding in or on the vehicle designated therein, if it is being operated by a person qualified and authorized by law to drive a motor vehicle;

in the amounts hereinafter specified, against loss from bodily injuries sustained directly, and independently of all other causes, through accidental means, excluding suicide while sane or insane, or any attempt thereat while sane or insane, provided that such bodily injuries are suffered by such person as a result of riding in or on such vehicle while it is moving on a public highway beyond the boundaries of Saskatchewan but within Canada, Newfoundland or the United States of America."¹

"16.—(3) Subject to the provisions of this Act, an operator's certificate shall further insure the person named therein, if he is domiciled in Saskatchewan, in the amounts hereinafter specified, against loss from bodily injuries sustained directly, and independently of all other causes, through accidental means, excluding suicide while sane or insane, or any attempt thereat while sane or insane, provided that such bodily injuries are suffered by such person as a result of operating or driving a motor vehicle designated in an owner's certificate while it is moving on a public highway beyond the boundaries of Saskatchewan but within Canada, Newfoundland or the United States of America."

The benefits which are payable fall into the following categories:

- (a) Weekly indemnity for loss of income;
- (b) Supplementary allowance;
- (c) Lump sum payments for loss of eye or limb;
- (d) Death benefits.

Weekly indemnity is payable to a person who, within twenty days of the accident, becomes continuously disabled from injuries suffered as a result of one of the perils mentioned in Section 16 and is prevented from performing one or more daily duties pertaining to his occupation or employment and whose income therefrom is thereby reduced: S. 18 (1). The amount of indemnity is the difference between

- (a) the average weekly earnings of the claimant for the twelve months prior to the accident and the amount which he earns or is able to earn weekly following the accident; or
- (b) \$20.00 a week and the amount which he earns or is able to earn weekly following the accident

whichever is the less: S. 18 (1).

If the claimant is totally and continuously disabled and prevented "from performing any and every duty pertaining to his occupation," indemnity is payable for a period of 52 weeks and if, thereafter, he is not able to engage "in any occupation for wages or profit," he is entitled to indemnity until he has received a maximum of \$2,400 under the head of weekly indemnity: S. 18 (1).

The "insurer" considers a claimant to be totally disabled and prevented from performing "any and every duty" pertaining to his occupation if he is not able to perform any duty which in itself is capable of producing income. Similarly, "any occupation" as used in the Sub-section is considered to mean any occupation for which the claimant is suited, having regard to his age, training, etc. Thus, a farm labourer who suffers a back injury preventing him from doing any farm work except milking cows would be regarded as being prevented from performing any duty pertaining to his own or any other occupation, for it is doubtful whether any farmer in Saskatchewan would employ a man incapable of performing any useful service except milking, and

¹ Sub-section (2) above quoted is as amended by S. 5, Chapter 15, 1948. Prior to that amendment, Sub-section (2) came into operation only if the vehicle were being operated by a person holding a Saskatchewan operator's certificate of insurance and the passengers had protection under that Sub-section only if they had left Saskatchewan in the motor vehicle in which they were riding at the time of the accident. By the 1948 amendment, the latter qualification has been eliminated and the Sub-section provides protection to owner and passengers if the vehicle is being driven by a person "authorized and qualified by law to drive" in the jurisdiction where the accident occurs.

such a farm labourer, with such an injury, would not be qualified to engage in any other reasonably remunerative occupation.

Where the accident only partially disables the claimant, so that he is able to earn some income from the performance of some duty pertaining to his occupation, or where such partial disability follows a period of total disability, the claimant is entitled to indemnity for the duration of the partial disability but not exceeding 52 weeks: S. 18 (2).

Special provision is made for housewives. A housewife is defined by paragraph 11 of Section 2 as being:

"a married woman not engaged in a definite regular occupation for wages or for profit and not reporting regularly to a place of employment apart from her residence."

A housewife, of course, does not earn wages in their usually accepted sense. At the same time, the Committee recommended that some compensation should be provided in the event of a housewife suffering total disability in order to provide the family with the means for obtaining domestic assistance during the period of the housewife's disability. Weekly indemnity is paid at the rate of \$12.50 a week where a housewife is totally disabled, but for a period not exceeding six consecutive weeks: S. 18 (3).

The greatest difficulty facing the legislature when enacting the statute was to ensure that the farming population would not be deprived of the full benefits of the legislation with respect to weekly indemnity. The administrative difficulties in ascertaining a farmer's net income for the previous twelve months and the delay and expense involved would, in a great many instances, more than outweigh the resultant benefits. Moreover, in the Canadian west, it is quite common for a grain farmer to lose his complete crop by drought, hail or insects and, if such a farmer were involved in an accident after suffering such a crop loss and before the next season's crop were taken off, he would have no earnings for the previous twelve months on which indemnity could be based. Sub-section (4) of Section 18 was designed to simplify the problem by providing:

"For the purposes of Sub-section (1) the average weekly earnings of a farmer or rancher during the twelve months preceding the accident shall conclusively be presumed to be \$20."

It was also necessary to make special provision for unemployed persons. Unemployment benefits are payable under The Unemployment Insurance Act, 1940 (Canada), only so long as the recipient remains able and willing to work. If such a person is disabled in a motor vehicle accident, he therefore loses his right to unemployment benefits. The Automobile Accident Insurance Act provides that weekly indemnity shall be paid to such a person to the extent of unemployment benefits lost but in no event more than \$20 weekly: S. 18 (5).

The "insurer" may also agree with the claimant to commute weekly indemnity and pay a lump sum: S. 18 (6).

In every case, there is a waiting period of seven days following the accident during which and in respect to which no weekly indemnity is payable: S. 18 (7).

Supplementary allowance is provided for by clause (a) of Sub-section (1) of Section 19 which is in the following terms:

"A supplementary allowance to such insured, the amount and determination of which shall be in the absolute discretion of the insurer, according to the circumstances, provided that the sum payable in respect of loss from any one injury shall not exceed the sum set opposite such injury in Schedule A to this Act and provided further that the total sum payable under this clause in respect of all injuries sustained by one person in any one accident shall not exceed in the aggregate \$225."

Schedule A contains a list of defined injuries and specifies for each injury the maximum amount which may be paid as supplementary allowance for that injury. These maxima are, however, subject to further increases where the injury is complicated. No supplementary allowance may be paid unless the

injury is sufficient to require at least one attendance by a duly qualified physician. The supplementary allowance is not necessarily a medical and hospitalization indemnity. The amounts fixed as maxima, however, in Schedule A were established having in mind the usual medical charges, including X-Ray, and usual hospital charges for each particular type of injury. The administration, moreover, has found it advisable to take into consideration only those actual expenses or liabilities incurred which, in the circumstances of the particular case, are necessarily incidental to medical treatment.

Lump sum benefits for loss of eye or limb are fixed by the statute and range all the way from \$250 for loss of a thumb at or above the metacarpo-phalangeal joint to \$2,000 for loss of sight of both eyes or for certain other losses: S. 17 (3). The loss must occur within

- (a) One hundred and twenty weeks of the date of accident if the claimant has been totally and continuously disabled and prevented from performing any duty pertaining to his occupation; or
- (b) Ninety days from the date of accident in other cases, provided that this latter period may be extended to one year if, at the end of each thirty day period following the ninety days, the claimant furnishes a medical certificate to the effect that he is being treated for an injury which may eventually lead to the loss of a member for which indemnity is payable under this Sub-section: S. 17 (3). Benefits payable under Sub-section (3) are in addition to all other benefits to which the claimant may be entitled, except that if the claimant dies as a result of his injuries after having received benefits under Sub-section (3), such amount is deducted from the death benefits, the amount payable to each beneficiary being reduced proportionately: S. 17 (4).

Death benefits are payable when death occurs within 120 weeks of the accident where the victim has been totally and continuously disabled and prevented from performing any duty pertaining to any occupation or employment: S. 17 (1), and within 90 days in other cases: S. 17 (2). In the event of death, the "primary dependent" of the deceased becomes entitled to the sum of \$3,000: S. 20 (1). The term "primary dependent" is defined in paragraph 22 of Section 2 as follows:

- "(a) The wife of an insured unless, at the time of the death of such insured, she was living apart from the insured under circumstances disentitling her to alimony;
 - (b) the dependent husband of an insured unless, at the time of the death of such insured, he was living in adultery apart from the insured;
 - (c) the dependent child or children of an insured, if the wife or dependent husband predeceases such insured or is otherwise prevented from qualifying as a primary dependent by reason of clause (a) or (b) of this paragraph;
 - (d) the dependent parent or dependent parents of an insured if such insured is not survived by any of the persons qualifying as primary dependents under clause (a), (b) or (c) of this paragraph;
- and no parent, not being a dependent parent as herein defined, shall be deemed to have been a primary dependent for the purposes of The Automobile Accident Insurance Act, 1946".

The "secondary dependents" are entitled to the sum of \$625 each, provided that if all claims of the secondary dependents exceed \$7,000, the sum of \$7,000 is divided equally among them: S. 20 (1). "Secondary dependent" is defined for the purposes of the Act by Paragraph 25 of Section 2, as follows:

- " 'Secondary dependent' includes any dependent child or parent of an insured who is not a primary dependent."

The following definitions will assist in the understanding of the scope of "primary dependent" and "secondary dependent".

"'Child' includes son, daughter, step-son, step-daughter, adopted child, a person to whom an insured stands in *loco parentis*, and a person for whose support an insured was, at the time of his death, liable pursuant to the provisions of any Child Welfare Act;" S. 2, Paragraph 4.

"'Dependent child' means a child under the age of eighteen years who is dependent upon an insured, or a person of the age of eighteen years or more who by reason of physical or mental infirmity is unable to maintain himself without the assistance of an insured;" S. 2, Paragraph 7.

"'Parent' includes, father, mother, step-father, step-mother, a person who has adopted an insured, and a person who stands in *loco parentis* to an insured;" S. 2, Paragraph 21.

"'Dependent parent' means a parent of an insured who by reason of physical or mental infirmity is unable to maintain himself or herself without the assistance of such insured. The mother of an insured shall be deemed dependent if she is a widow, or the wife of a man who is the inmate of a gaol or penitentiary and has been committed thereto for a period of not less than six months, or of an institution for incurables or for the feeble-minded or insane, or of a man who is permanently incapacitated by incurable disease or insanity from contributing adequately to her support or that of her family, and if she is unable to maintain herself without the assistance of such insured." S. 2, Paragraph 9.

In any case where the primary dependent is a class of persons, as would be the case where the victim is a widow or widower leaving children as orphans, the amount of benefits payable is calculated as if only one of the class were a primary dependent and the remainder were secondary dependents. The sum actually payable to each member of the class is a *pro rata* share of the whole: S. 20 (2). Thus, if the victim is a widower leaving three children surviving him, the total sum payable to the children is \$4,500 and each child is therefore entitled to \$1,500.

If the deceased is a child and no benefits are payable by reason of his death to any person as primary or secondary dependent, death benefits are payable to the parent of the deceased who, at the time of death, was providing the means of support according to the following scale:

10 years		\$ 500.00
11 years		\$ 600.00
12 years		\$ 700.00
13 years		\$ 800.00
14 years		\$ 900.00
15 years		\$1000.00 S. 20 (3) (a).

Where the deceased is survived by a brother, sister, child or parent who, although not strictly falling within the statutory definition of dependency, have nevertheless been receiving definite regular contributions from the deceased for maintenance and support, such survivors are entitled to the sum of \$2,000 divided equally among them, provided that the deceased is not a child under the age of eighteen years in respect of whose death the parents would be entitled to benefits under clause (a) of Sub-section (3): S. 20 (3) (b).

Where the deceased is a married woman in respect of whose death no other benefits are payable under Section 20, the widower is entitled to the payment of \$1,000: S. 20 (3) (c).

In all cases of death the sum of \$125 is payable in lieu of funeral expenses: S. 19 (1) (b).

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Provision is made for the payment of benefits to specified persons as trustees for a dependent where the dependent is a child, mentally defective person, or other person whose welfare might be best served thereby: S. 21.

Any accrued weekly indemnity or supplementary allowance remaining unpaid at the date of the death of the injured person is paid to his personal representative, S. 22, but if any person entitled to the receipt of death benefits (as the result of another's death) dies before such benefits are paid, no other person may claim such benefits as legal representative of the deceased claimant: S. 23.

No person may waive or agree to forego benefits to which he or his dependents may be entitled: S. 24.

Without the consent of the insurer, no benefits may be charged, assigned or attached, nor may they pass by operation of law (except for the purposes of Section 22): S. 25 (1). Sub-section (1) does not apply where the claim is for necessities supplied or contracted for after the accident: S. 25 (2).

The following persons and their dependents are excluded from making any claim for benefits:

- (1) A non-resident riding in or on a motor vehicle not registered in the Province; S. 26 (a);
- (2) A person with respect to whom compensation, other than funeral expenses, is payable under the terms of The Workmen's Compensation (Accident Fund) Act: S. 26 (b);
- (3) "A person riding in or on one of the following: a vehicle or mechanical device used for aerial navigation; a vehicle of an electric or steam railway running upon rails or tracks or solely upon railway company property, a trolley bus, a fire engine, fire department apparatus, a road roller, street sprinkler, road building or road maintenance machinery, machinery used for construction of drainage works or water conservation projects, machinery used for excavation purposes, or a tractor, except a tractor used by a farmer in connection with his farming operations, which is not required to be registered with The Highway Traffic Board, under The Vehicles Act, 1945." S. 26 (c).²

Payment of benefits is also subject to compliance with the statutory conditions set out in Section 27 of the Act. Condition 1 lays down prohibitions against:

- (a) Driving a motor vehicle without an operator's certificate of insurance and against driving a motor vehicle which being required to be registered with The Highway Traffic Board is not so registered.³
- (b) Driving a motor vehicle to which is attached an unregistered trailer, unless the trailer is one used exclusively for private passenger use or farming operations.
- (c) Engaging in conduct contrary to the criminal law.
- (d) Riding in or on a vehicle except on a portion thereof which is designed for the seating of passengers or the carrying of a load.
- (e) Riding in or on a motor truck unless properly seated on a portion thereof which is designed for the seating of passengers or the carrying of a load in such a way as may be considered safe for that mode of carrying passengers.
- (f) Taking hold of a vehicle for the purpose of being pushed or pulled thereby unless in or on that portion of the vehicle designed for the seating of passengers or the carrying of a load.

The condition goes on to impose an obligation upon the owner of a vehicle

² These vehicles are not required to be registered as motor vehicles: S. 2 (16)—S. 25—Chapter 98, 1945.

³ Under clause (a) of condition 1—amended by S. 5, Chapter 11, 1949—a driver who has an operator's certificate of insurance but who is injured while driving a car of foreign registry in Saskatchewan is covered.

not to suffer, permit, allow or connive at the use of his vehicle contrary to the condition. The condition has been interpreted by the administration as being suspensory in nature rather than a condition of precedent, so that the only question to be asked is whether the claimant was in breach at the time of the accident.

When a motor vehicle is involved in an accident resulting in damage to property apparently exceeding \$50 or personal injuries, the person in charge of the vehicle and every person suffering injuries must report the matter as soon as possible to the nearest or most accessible police officer and make a statement in writing concerning the cause of the accident and the extent of injuries or damage, and the police officer must send such statement, or a copy thereof, to the "insurer": S. 37 (1). The "insurer" may also require reports at any time from any person having knowledge of such an accident or the injuries sustained: S. 37 (3), S. 39. The owner of a public service vehicle involved in an accident resulting in any damage must report to the "insurer"; S. 40. The purpose of these sections is primarily to prevent fraudulent claims and to assist the "insurer" in building up statistics as to the cause of accidents for its safety programme. Failure to comply is a punishable offence: S. 44, and is also sufficient to vitiate any claim which the offender might have under the Act. S. 27 (5).

If notice of claim is not filed within the required period of fifteen days, the claim is not invalidated if it is shown that such notice was given as soon as practicable, but proof of claim must be filed with the "insurer" within sixty days after the happening of the accident: S. 27 (4). The forms for proof of claim are mailed by the "insurer" to the claimant within fifteen days after receipt of notice of claim: S. 27 7 (a), and a form for completion by the attending physician is also furnished by the "insurer" as part of the proof. The "insurer" has the right to have the person of the claimant examined at any reasonable time: S. 27 7 (b).

All benefits, except weekly indemnity, must be paid within sixty days after receipt of proof of claim: S. 27 8 (a), and weekly indemnity within thirty days after proof, provided that if the duration of disability is longer than sixty days, the "insurer" may require proofs at the end of each thirty day period.

Where a claimant is entitled to benefits for loss of time under a contract of accident insurance and such benefits, together with the weekly indemnity which would otherwise be payable under Section 18, exceed the average weekly earnings of the claimant for the twelve months prior to the accident, the "insurer" only pays such proportion of the weekly indemnity specified in Section 18 as the loss of income bears to the aggregate of benefits under such other contract and the amount otherwise payable under Section 18. S. 27 (6).

Thus, where a totally disabled claimant was earning an average weekly income of \$35 prior to the accident and is entitled to \$20 weekly under a contract of accident insurance for loss of time, he will be entitled to $\frac{35}{40}$ of \$20 or \$17.50 weekly under Section 18.

The false description of any vehicle on an application for insurance to the prejudice of the "insurer"; the failure to disclose or the misrepresentation of any fact required to be stated in the application; the violation of any term of the Act or condition of coverage, or the commission of any fraud or the making of any wilfully false statement with respect to any claim, defeats any claim by or on behalf of the offender or by his dependents for benefits under Part II or insurance money under any other coverage of the Act: S. 47. The court may, however, relieve against any forfeiture of benefits or insurance money resulting from imperfect compliance with the requirements relating to the making of a claim where such forfeiture is, in the circumstances, deemed inequitable: S. 36.

Irrespective of the amount involved, all actions against the "insurer" for either benefits under Part II or for insurance money under any other coverage must be brought in a "district court"—an inferior court of record analogous to

the English county court: S. 33, and no costs may be allowed either party to such proceedings: S. 34.

The principle of collective responsibility, irrespective of fault, is made more effective by Section 48. Under that Section, one whose person or property suffers injury as the result of the negligent operation of a motor vehicle may only recover, from the owner and operator of such vehicle, if the owner and operator hold certificates of insurance, the amount by which his assessed damages exceeds

- (a) all amounts paid under Parts II, III, IIIb or IIIc with respect to the injury; or
- (b) all sums which would have been paid under those Parts if a claim under the Act has been rendered invalid by reason of Section 47; or
- (c) where no claim has been made under the Act, the amount which would have been paid had the claim been made.

The "insurer" may recover, by an action for damages unfettered by Section 48, the amount of any payment which it has to make under Parts II, III, IIIb or IIIc, with respect to loss or damage caused by the fault of a person who at the time of the accident

- 1. was operating a motor vehicle
 - (a) while not authorized and qualified by law to drive;
 - (b) in a manner or for a purpose contrary to the criminal law;
 - (c) while attached to the vehicle was an unregistered trailer, unless that trailer was a "farm" trailer or "private" trailer; S. 49 (1), or
 - (d) which was not designated in an owner's certificate; or
- 2. did not own or operate any motor vehicle involved in the accident and who, by reason thereof or by reason of Section 47, was precluded from receipt of accident benefits or insurance money; or
- 3. did not own the motor vehicle causing or sustaining the loss or damage but was operating or repairing the same in his business or employment as an automobile garageman: S. 49 (2).

The "insurer" may take such action in its own name against all persons liable under any law for the loss or damage for the amount actually paid out by it or may join with the person receiving payment under the Act to bring but one action in the name of such person for the whole of the damages suffered: S. 49 (2).

Saskatchewan is, of course, a predominantly agricultural province. The automobile and motor truck have become almost indispensable farm equipment. Where no compensation is available, extensive damage to one of these vehicles could have effects as serious to the individual farmer as a crop failure. This was undoubtedly an important consideration behind the decision of the Government to introduce collision insurance in 1947 and fire and theft insurance in 1949. Then too, it would appear that the principle of collective responsibility for losses, irrespective of fault, can quite legitimately embrace damage to motor vehicles caused by collision or fire at least to the extent that the collision or fire is caused to or by a motor vehicle in motion.

The indemnity to which the owner of a motor vehicle or trailer is entitled by reason of his owner's certificate of insurance under the collision, fire (including loss or damage caused by fire, lightning or the stranding, sinking, collision, burning or derailment of any conveyance on land or water, in or upon which the vehicle is being transported, including general average and salvage charges, for which the insured is legally liable), see S. 31k (1) (b), and theft coverages, is the difference between the amount of loss or damage and a deductible average which is fixed for each class of vehicle by regulation of the Lieutenant Governor in Council: S. 30 (2); S. 31k (2); S. 31o (2). At the present time, for example, the sum of \$100 is deductible from each claim made by the owner of a private passenger automobile under any of these coverages: Schedule A to

the Regulations (O.C. 2113/48). The amount of loss or damage is ascertained by the actual cash value of the vehicle immediately prior to the loss, and in no event is the "insurer" liable for the amount of any loss or damage which exceeds what it would cost to repair or replace the vehicle or any part thereof with material of like kind and quality, at a place designated by the "insurer": S. 30 (2) (a); S. 31k (2) (a); S. 31o (2) (a).

The collision, fire and theft coverages are all subject to the statutory conditions contained in Section 31; S. 31; S. 311; S. 31p, except that, of course, a claimant cannot be held responsible for the act of a thief which would otherwise amount to breach of condition: S. 31p.

The owner of a vehicle has no claim if the vehicle is operated by him or any other person

- (a) in a manner or for a purpose contrary to the criminal law;
- (b) while not authorized and qualified by law to drive;
- (c) in any illicit trade or transportation;
- (d) in a race or speed test;
- (e) while an unregistered trailer, except a "farm" or "private" trailer, is attached;
- (f) if it is not adequately illuminated during darkness or period of poor visibility;
- (g) for any purpose for which the vehicle is not registered: S. 31 (2).

The claimant must comply with the provisions of Sections 37, 39 and 40: S. 31 (6), and, in addition, notify the "insurer" immediately on the occurrence of any loss: S. 31 (7). He must not remove any physical evidence of damage except to the extent that this is necessary to prevent further damage: S. 31 (7).

When adjusting a loss, the "insurer" evaluates the amount of loss or damage but the claimant may elect, instead of accepting cash settlement, to have his vehicle repaired at a place designated by the "insurer": S. 31 (9). (Although the "insurer" maintains a salvage depot, it does not, as a general rule, use these facilities for repairing motor vehicles for claimants. It merely insists that the garage to which the claimant takes his vehicle be one which is equipped to do the necessary repairs at reasonable rates.) In the event of disagreement as to the nature and extent of repairs necessary or their efficacy, if affected, or with respect to the value of any vehicle or salvage, either the "insurer" or the claimant may, within six months after filing of proofs of loss, apply to have the dispute settled by a referee: S. 31 10 (1). The referee is appointed by the Lieutenant Governor in Council, S. 31 10 (3), and no matter which is determinable by a referee may be decided or reviewed by any court. S. 31 10 (5). The "insurer" is not required to pay any claims under Parts III, IIIb or IIIc where any portion of the loss or damage for which indemnity would otherwise be payable is covered by a policy of insurance: S. 31 13.

The introduction of public liability and property damage insurance by the enactment of Part IIIa in 1948 should not be viewed as an abandonment of faith in the principle of collective responsibility, irrespective of fault. The introduction of these coverages was made more or less necessary by the fact that neighbouring jurisdictions, by 1948, had enacted "safety responsibility laws"—semi-compulsory liability insurance schemes—which affected residents and non-residents of those jurisdictions alike, and by the fact that a great number of motor vehicles of foreign registry enter Saskatchewan each year, and to whom it would be difficult to extend the collective responsibility provisions of the Act.

The indemnity which is payable under Part IIIa is

- (a) \$5,000 (exclusive of interest and costs) for personal injury or death to one person in one accident, less the amount by which the claim of such injured person has been reduced under Section 48; S. 31c 1 (f) (1).
- (b) subject to the above limit, for two or more persons injured or killed

in one accident, \$10,000 (exclusive of interest and costs) less the amount by which the claims of such injured persons have been reduced under Section 48; S. 31c 1 (f) (2).

- (c) \$1,000 (exclusive of interest and costs) for damage to property in one accident, less the amount by which the claim of the property owner has been reduced under Section 48, less an additional \$100 if the accident occurs in Saskatchewan: S. 31c 2 (c) and (d).

In addition, the "insurer" is required to defend any civil action brought against any person insured by reason of an owner's certificate where the damages claimed in such action are within the limits of the indemnity; to pay any costs taxed against such person in the action, and to reimburse such person for expenses incurred in obtaining immediate medical aid for any other person involved in the accident: S. 31d.

The statutory conditions governing this coverage impose certain prohibitions on the use of a vehicle which are quite similar to those found in policies of motor vehicle liability insurance. A vehicle may not be used or driven in a manner or for a purpose contrary to the criminal law; by a person who, for the time being, is not authorized and qualified by law to drive; while attached thereto is an unregistered trailer unless the trailer is a "farm" or "private" trailer; in any illicit trade or transportation, or in any race or speed test: S. 31h 2 (1).

Where the vehicle is being driven by a person other than the owner, the "insurer" can not avoid liability to the owner unless it can be shown that the owner permitted, suffered, allowed or connived at the use of the vehicle contrary to the conditions: S. 31h 2 (2).

Where there is a motor vehicle liability insurance policy in effect, at the time of any accident which would otherwise overlap the indemnity provided for under the Part, public liability and property damage insurance under the Act becomes excess to such other insurance: S. 31h 8.

Third parties are protected against any act or default of an "insured" in the same way as they are under most other motor vehicle liability insurance statutes. Any person having a claim against an insured for which indemnity is payable under Part IIIa may proceed against the "insurer" to have the insurance money paid in or towards the satisfaction of his claim—S. 31e (1)—and no transfer, assignment, surrender, cancellation, suspension or discharge of a certificate, any interest therein or the proceeds thereunder, after the event giving rise to the claim, no act or default of the insured either before or after such event, no violation of the Act or of any law is available to the "insurer" as a defence in any such proceedings—S. 31e (3)—unless there is in effect a policy of motor vehicle liability insurance which, by virtue of Section 31h 8 is primary coverage: S. 31e (4). The insured is, however, liable to reimburse the "insurer" upon demand the amount of any payment made by virtue of this section which it would not otherwise have to pay: S. 31e (5).

The application of the principle of collective responsibility, irrespective of fault, has been limited by practical difficulties—chiefly arising from the free interchange of traffic between Saskatchewan and other jurisdictions which do not have legislation similar to Parts II and III of The Automobile Accident Insurance Act. It is not possible to determine the extent to which Parts II and III have reduced liability claims because there is no readily available record of the number of liability suits brought annually prior to 1948. However, some indication might be given by the fact that, in the period from April 1, 1948, to March 31, 1949, 1,731 claims were made under Part II and approximately 5,500 under Part III, while during the same period, 132 public liability and 551 property damage claims were made under Part IIIa. A number of these public liability and property damage claims would, of course, arise out of accidents in which non-residents and other persons excepted from Parts II and III

suffered losses while, on the other hand, a number of claims paid under Parts II and III would occur under circumstances which would not give rise to a liability claim at any event.

Although the Act does not provide complete insurance against all risks incidental to the operation of a motor vehicle, it has lessened, for victim and motorist alike, the economic burden of motor vehicle accidents and places the incidence of losses substantially where it perhaps belongs. The cost to the individual motorist has been low. For example, the "premium" payable for an automobile in the highest rating group of private passenger cars is no higher and in many cases is not as high as the premium which the owner of such an automobile would have to pay outside the Act for \$100 deductible collision coverage alone. Although there have been rate adjustments for individual classes, there has been no general rate increase since the inception of the plan. As of April 1, 1949, there was a surplus of \$1,085,970.20 remaining in the fund to the credit of Saskatchewan motorists, and it would now seem that the chief problem facing the Government is whether to increase the indemnity limits, to include additional forms of indemnity or to provide for a general rate reduction.

THE DEVELOPMENT OF THE BRAZILIAN CONSTITUTION (1891-1946)

[Contributed by MARCUS WYLER, of the Zurich Bar]

In this paper we understand by Brazilian Constitution the Constitution of the United States of Brazil, not that granted to the Empire by Dom Pedro I and promulgated on March 24, 1824, which continued in force down to November 1, 1891.

The first Constitution of the Republic was drawn up along the lines of that of the U.S.A., except for a few articles derived from the Argentine Constitution of 1853-60 and the Swiss Constitution of 1874. (See Rodrigo Octavio de Menezes, *Constituições Federaes*. Rio de Janeiro, 1897.)

There was no stringent reason why the U.S.A. Constitution should have been copied to that extent by Brazil, except that the Argentine Constitution had the same source. Although the Brazilian Constitution called the Union "Estados Unidos," it made the former Provinces States *ex post facto*, since under the Empire they had been administrative subdivisions of a centrally governed State Empire. But of course there was an inner reason for constituting both the Republic and the States along U.S. lines. In the same way that the U.S.A. and its individual States had and to a large extent still have a strongly presidential or gubernatorial character, whenever (as generally) the President or Governor is a man of some strength or originality, so it was with Brazil and its component States, some of which became under the Republic very considerable entities, such as Sao Paulo or Minas Geraes. In this respect we have to consider the 1937 Constitution as a passing interlude, since during it the President of the Republic deposed most of the Governors of the States and put into their place "Interventores," who, with some exceptions, became virtually presidential executives.

The first Constitution remained in force until 1934, or, practically speaking, up to Senhor Getulio Vargas' first Coup d'Etat of October 24, 1930. A new Constitution was signed by the members of a Constituent Assembly on July 16, 1934.¹

This second Constitution lasted only three years. President Getulio Vargas and his government replaced it with a Constitution issued on November 10,

¹ See as to its main character a short sketch by the present writer in Vol. XVII, Part I, p. 124 of this Journal. It was stated there that the new Constitution "beware (d) of extremes, whether in the way of the 'Führerprinzip,' corporative experiments, nationalism and State socialism, and though affected by all of them, the nationalist tendency (was) strongest."

1937, published in the *Diario Oficial* Nr. 257 of the same day, and republished in a new spelling on November 18, 1937.²

Article 187 of this Constitution stated that the Constitution came into force at once, but that it would be submitted to a national plebiscite in a way to be determined by the President of the Republic. This Decree was never issued. Senhor Vargas remained President up to October 30, 1945. He was followed on December 2 by the present President, Major General Enrico Gaspar Dutra, Minister of War in President Vargas' Cabinet. A new Constitution was issued and signed after careful deliberation by a Constituent Assembly, on September 18, 1946.

Only a very detailed and correspondingly complicated comparison could show to what extent the Constitution now in force has returned to its former basis, the Constitution of the U.S.A., and to what extent it has retained features which show the influence of European events and developments, and in fact the recent history of Brazil itself.

It may be preferable to choose a few basic particulars of the Constitution and compare in a few words the provisions relating to them in the four Constitutions of 1891, 1934, 1937 and 1946. It will not be a literary treat, but it may be an object lesson.

It may not be entirely amiss if we mention here the old theory of the "pays légal" and the "pays réel," and request the reader not to forget that underlying all the outer forms of a Constitution which has been changed three (or including a few minor reforms of 1926, four) times within a lifetime, there are psychological, intellectual and economic forces, and that there have always been parties, at present at least the Partido Social Democratico, the Partido Trabalhista Brasileiro, the Partido Social Progressista (Adhemar de Barros), the forbidden Communist Party, which seems to have more or less retained its membership, and also the Catholic Church, and still more major and minor forces, which "run" Brazil. We now proceed to give in outline our comparison.

The President of the Republic.

1891. Art. 43 of the Constitution of 1891 provided that the President must not be re-elected immediately after his first term. The presidential functions were nearly the same as in the U.S.A. Term of office four years.

1934. This Constitution maintains the non-re-eligibility of the President after the first four years' term.

1937. The "Estado Novo" is instituted before the end of the President's term under the old Constitution. The President is now called "the Supreme Authority of the State" (Art. 73). He acquires most of the functions of the former Senate. Moreover he assumes the power to make ordinances, or "decrees-laws" (*decretos-leis*) (Arts. 12, 13, 74, b). His right of intervention in the States is considerably increased, among other things "in order to assure presidential (i.e. gubernatorial) government in the individual States" (Art. 9, c.2.) This was practically carried out by nominating "Interveners" in the States, instead of Governors. These generally became his agents.³

The President's term was increased to six years, but under Art. 175 of the Transitory Dispositions the term for the first holder of the office was to start after the plebiscite proposed under Art. 187 of the Constitution. Since this plebiscite was never decreed, the term for the maker of the Constitution depended only on his will.

1946. This Constitution makes detailed rules as to the prerogatives and

² A French translation appeared in Tome XXXIX, 1, of the *Bulletin de l'Institut International* (Hague), of July, 1938. See also the present writer's paper on it, in the *Bulletin Trimestriel de la Soc. de Lég. Comp.* 1937, p. 322 ss.

³ It would seem that this was not so with Dr. Adhemar de Barros, Intervener of Sao Paulo, who started a political activity of his own. After the disappearance of the Estado Novo in 1945 he became Governor, and is said to be one of the Presidential candidates for 1950, as head of the Partido Progressista.

duties of the President. He has to promise solemnly (Art. 84) to maintain the Constitution, and to observe the laws. While the President under the 1937 Constitution was practically unassailable, except for common law crimes, his responsibility under the 1946 Constitution (Art. 88) is clearly defined. Unlawful interventions in the States might be "crimes de responsabilidade" under Art. 89 II. The President is no longer authorized to make decree-laws, but only to make ordinances for the "faithful execution of the laws" (Art. 87, I). Laws are made by the Legislature, and subjected to his Veto, which may be overruled by the Chambers of the Congresso Nacional (Art. 70).

The Cabinet.

The original position of the Cabinet was nearly the same as under the U.S.A. Constitution. The Secretaries or Ministers were nominated and dismissed by the President.

1891. The Ministers were called the confidential agents of the President (Art. 49); they were not supposed to appear before Congress. They were not responsible for their administrative acts.

1934. The position of the Ministers has not virtually changed, but they may be summoned to appear, and may also appear of their own choice before each of the two Chambers. Each Ministry has official technical "Counsel" of which at least one half must not be servants of the State.⁴

1937. The Ministers are again reduced to the status of simple confidential agents of the Supreme Authority. They are responsible for their acts, if these are common law crimes or crimes under a special law. (Art. 89, sections 1, 2).

1946. The President "is assisted (auxiliado) by the Ministers of State." Their attributions shall be fixed by law. Besides this, they are to countersign the acts of the President (Art. 91, I) and to issue instructions for the better execution of laws, decrees and regulations. Their appearance before the Chambers is governed by definite rules in the Constitution (Art. 91, IV.) Their "crimes of responsibility" are also specially defined, and it is said (Art. 93) that the Ministers are responsible for the acts which they sign, and also, jointly with the President, for those which they perform (*praticarem*) by his order. (Art. 93.)

The Legislative Power. (Do poder legislativo.)

1891. The Chamber of Deputies and the Senate are elected more or less in the same way, and have more or less the same powers as those of the U.S.A. Congress.

1934. The real Legislature is the Chamber of Deputies (*Camara dos Deputados*). There are members elected directly by the people (*do povo*), at the rate of one deputy for 150,000 inhabitants, up to 20 deputies, and at the rate of 250,000 inhabitants for big States which have more than 20 Deputies. In this way the preponderance of the bigger States is reduced, although in other federations this result is produced by the rule that each State has one or more Deputies in the *First Chamber*. When the Deputies "of the people" are elected, a second election takes place for the "occupational" deputies (*professionalistas*). They were to be elected by the occupational bodies (guilds and/or syndicates). In each State the number of the occupational Deputies was to be one fifth of those of the people. Six sevenths of the "occupational" Deputies were to be elected from among the Divisions of "Produce and Cattle Farming, Industry, Business and Transportation, and the Liberal Professions" and one seventh by State functionaries. In the first three Divisions an equal number of employers and employees were to be elected. The two categories of Deputies were to sit together. The Senate was elected by the States. It was no longer co-equal with the Chamber of Deputies. Its Powers were defined in a special chapter dealing with "co-ordination of the powers" (*co-ordenação dos poderes*). It had some prerogatives, which still derive from the U.S.A. Constitution in the

⁴ A good rule, M.W.

nomination of high officials and of Justices. One half of it was to sit as Permanent Section during the recess of Congress (November 3 to May 3), and during that period was to represent, more or less, the People in its relations with the President.

1937. The Chamber is elected by indirect suffrage. The electorate are the "vereadores" of the municipal councils (i.e. borough councillors), plus for each "município" ten special electors elected at the same time as the borough councillors. Each State is to have at least three deputies, but none more than ten. Thus, according to the book "Brésil" published in 1945 by the Ministry of Foreign Affairs, the State of Sergipe had an estimated population of 606,000 for 1946. It would have had three Deputies, being one of the least populous States. Minas Geraes, being the most populous, with an estimated population of 7,756,000, would have had ten. This amounts clearly to a representation of States, not of the People.

The Senate was transformed into a Federal Council (*Conselho Federal*) elected by the parliamentary bodies of the States, but under a Veto of the Governor, who, as from 1937, would regularly be an Intervener chosen by the President. Besides these members elected, subject to executive Veto by State legislature, there would be ten members nominated by the President. This Council legislated for the Territories, of which there existed in 1945 seven: Acre, Rio Branco, Amapô, Guaporé, Fernando de Noronha, Iguaçú and Ponte Porã, of which six had been formed by dismemberment from States. There were military reasons for these creations, except for Acre, which had always been a Territory.

Then the 1937 Constitution had a "Council of National Economy," which was an improvement on the solution provided by the "occupational deputies" of 1934. While the indirect election of the Chamber of Deputies reduced its political importance, the new Economic Council (*Conselho Nacional de Economia*), was to be chosen by nomination from among the occupational Unions and Syndicates authorized by the State, i.e. from the Corporations created under Art. 140 of the Constitution of 1937 (on Italian and Portuguese lines). The chair of this Council was to be held by a Minister specially designated by the President. Its function was only a consultative one. It may be mentioned here, that in the Constitution of 1946 this Council has been re-established, and its organization is to be regulated by law. Its members are to be nominated by the President "from among citizens of proven (*notoria*) competence in economic matters." His choice is to be confirmed by the Senate (Art. 205).

1946. The old Senate and the old Chamber of Deputies have been re-established. For the election of the Chamber the proportional figures of the 1934 Constitution are again in force, less the "occupational" Deputies (Art. 58). Each State is represented by at least seven Deputies; the same applies to the Federal District (Rio de Janeiro). Each of the remaining Territories (two of which, Iguaçú and Ponte Porã having been returned to the States from which they were cut off (Art. 8 Transitory Dispositions), has now a representation of one Deputy too.

The Senate is composed of delegations of three members from each State, and also from the Federal District.⁵

The Federal District is now equal to the States in its representation in Congress, and is also admitted to self-government; for although its Prefect or Governor is still nominated by the President, it is entitled to elect a Chamber of Deputies. Moreover, we may mention here that, while the Constitution of 1891 and each consecutive one had provided that a new Capital of the Republic should be created in the Interior (*o planalto central do país*), this intention is at last to be executed. Indeed the Transitory Dispositions (Art. 4) have already made provision for it, and a committee has been set up. The example of Canberra has shown that it is feasible. (Constitution Art. 1, sections 1, 2, 25,

⁵ This is an improvement on the scheme of the U.S.A. Constitution.

26, Disp. Trans. 4.) When this plan is executed the present Federal District, i.e. the City of Rio de Janeiro will become the State of Guanabara.⁶

The Presidency of the Senate is held *ex officio* by the Vice-President of the Republic, with a casting vote.

The privileges and attributions of Congress are again more or less those of 1891, with some elements of 1934.

Thus the Budget is dealt with minutely, as already in 1934, with insistence on its checking by the Court of Accounts (*Tribunal de Contas*), Art. 73-77, "*do Orçamento*." Moreover, that Court had been retained in 1934 and 1937.

The Judiciary.

1891. The first Constitution created the Supreme Federal Court (*Tribunal Supremo*) and a Federal Judiciary in the States, according to presumed local needs. It was more or less a copy of the U.S.A. system.

1934. The Tribunal Supremo is now named "*Côrte Suprema*," and Federal Collegiate Courts of Justice were created, whereas there had formerly been only single Federal Judges in the States sitting alone. Still, the attribution of Jurisdiction is not very different from that of the U.S.A. The Federal Courts might declare laws and acts of authorities unconstitutional.

1937. Federal Justice in the individual States is abolished. The style of "*Tribunal Supremo*" is re-established. There are otherwise few changes in the prerogatives of the Federal Judiciary, except (Art. 96) that it would require the absolute majority of all the members of a Court (which practically means the Federal Supreme Court) to declare an act or a law of the President unconstitutional. Even supposing such a decision of the Federal Court occurred, if the President considered the law as "necessary for the well-being of the People, the protection or the defence of a national interest of high importance," he might submit the law once more to the two chambers of Congress, and if it was accepted by them, by a two-thirds vote, the decision of the Court remained without effect.

1946. This Constitution created side by side with the Federal Supreme Court, a Federal Tribunal of Recourse (*Tribunal Federal de Recursos*). Apparently the duplication of Courts in the States no longer appeared to be desirable. The new Tribunal has a special jurisdiction in matters of Public Law (Art. 94 II, 104, 105) notably in questions of personal freedom, such as "*Habeas Corpus*" cases. "*Habeas Corpus*" was taken over from Anglo-Saxon law, and has always played an important rôle in Brazil. There is further the "*Mandamus of Security*" (*mandado de segurança*). The Court also has jurisdiction in some penal matters and cases in which the Union has an interest.

The Military Tribunals are maintained, as a matter of course.

The Electoral Tribunals, which were a great asset in the Constitution of 1934, but were not mentioned in that of 1937, are not only re-introduced, but their whole standard has been strengthened. (Arts. 109-121).

Further, there have been created a Superior Court of Labour, regional Courts and Committees (*juntas*), as well as judges of conciliation and decision. (Art. 122/3).

The Declaration of Rights.

The Declaration of Rights derives chiefly from the Bill of Rights of the First Amendment to the U.S.A. Constitution. The Swiss Constitution also exerted a slight influence. The character of the Bill of Rights of 1891 is egalitarian, liberal and secular. In this Constitution already anonymity in the Press is declared unlawful. (Art. 72 section 12.)

1934. A great part of the individual rights of 1891 has been maintained. In the Press Law the Right of Reply is guaranteed. No War propaganda shall be admitted. In fact Brazil always had a pacifist attitude, and also declares in the

⁶ A State of Rio de Janeiro already exists.

1934 Constitution that it will never resort to a War of Conquest. (Arts. 4 and 113 Nr. 9.)

1937. The Constitution maintains, though with some restrictions, quite a number of the former rights. There are of course some changes, in keeping with the tendency of the Constitution of 1937, such as a restriction in the manifestation of thought, the re-establishment of capital punishment for certain serious offences against the security of the State, and of the regime (e.g. Art. 122, lit. d): "the attempt to change the political or social order established by the Constitution," which in fact rested on the Coup d'Etat, so long as the plebiscite promised by Art. 187 Constitution had not taken place. There is, however, a great probability that, even if the Regime did not rest on a majority, it was backed by a very fair minority, at least for some years. Art. 122 Nr. 15 maintains the prohibition of anonymity in the Press, but provides for the possibility of a preliminary censorship, and grave penal and civil sanctions, extending to confiscation of his fortune, against the proprietor and/or director of a journal.

1946. Chapter II of Title IV (of individual rights and guarantees) has been increased again, and contains more guarantees for the citizen than defences of the State against the Individual. There is a clear reaction against totalitarian tendencies in Section 13 of Art. 141: "The organization, the registration or activity (*funcionamento*) of any political party or organization, the scheme (*programa*) or action of which are contrary to the democratic regime, based on the plurality of parties and the fundamental rights of man, are unlawful."

It is upon this ground that the Communist party has been declared unlawful, though it certainly continues underground, and its activities become sometimes manifest. Capital punishment is abolished again (Section 31). There is no corporal punishment (Section 3). In these respects (of personal freedom) the Constitution of 1946 is in its way a return to that of 1891, with some new features in accordance with general developments.

The States.

1891. This Constitution contains some elements which were transitory, since the Provinces only derived this statehood from it. The federal character of the Constitution shows in Art. 65, which leaves to the individual States all powers which had not been expressly attributed to the Union.

1934. The Constitution specifies the principles upon which the States shall be organized. Otherwise it contains nothing new.

1937. This Constitution does not contain any sub-title devoted to the States. It mentions the creation of new Territories with parts cut off from the States. It contains possibilities for the President to intervene more or less at will in the individual States. The legislative rights of the States have been reduced.

1946. The sub-title as to States remains abolished, but nevertheless the Constitution is more favourable to the States than the former one. While the Constitution of 1937 says (Art. 9) "The Federal Government will intervene if," that of 1946 says (Art. 7) "The Federal Government will not intervene in the States, unless" It is a change of attitude.

The Municipalities.

Constitution of 1891. The first Federal Constitution is extremely reserved as regards Municipalities (*municípios*). In fact, the term is nowhere defined, and except as to big cities, the idea of the municipality seems to be less developed than elsewhere. The Constitution of 1891 contains only one Article, 68, which refers to "municipios," stating that the individual States are to organize themselves in such a way that the "autonomy of the municipios remains assured in all that concerns their own interests." It appears from this that an autonomy of municipalities, whether towns, boroughs or circumscriptions, existed in the old Provinces.

1934. This Constitution is a little more explicit. It tries to assure a certain organization of the "municipios".

1937. Art. 26 of this Constitution retains the principle of 1891. Then it establishes that the municipalities shall elect their municipal councils (chambers) the so-called "*vereadores*." Formerly, and still in 1934, the "prefect" (*prefeito*), who might be a mayor, but also a borough president—the Governor of the City of Rio de Janeiro is called "*prefeito*" in the Constitution of 1946 (Art. 87 IV, where he appears as the Head of the Federal District)—was elected by the People. According to the Constitution of 1937 he is nominated by the Governor i.e., the Intervener.

1946. Art. 28 of this Constitution re-establishes the autonomous election of the prefect and the "*vereadores*" of municipalities. But even according to this Constitution the Prefects of Capitals of States, and of "*municípios*" which have natural spas or hydrotherapeutic (hydropathic) establishments, developed by the State or by the Union, may be nominated by the Governor of the State or the Territory where they are situated. Moreover, the prefects of municipalities which are declared of special military importance by a law which has been passed according to the opinion of the National Security Council (*Conselho de Segurança Nacional*), may be nominated by such governors.

Other Dispositions of the Constitution.

This part is bound to be rather miscellaneous, because the period from 1891 was one in which all over the world, although in very diverse ways, an old order was subjected to change, often to such extent as to be no longer recognizable.

1891. We have said that this Constitution was egalitarian, liberal and secular, at least in the part containing its Bill of Rights. It is on the whole a Constitution which establishes a form of Government, and leaves economic and social matters to take care of themselves. One of the more important special dispositions is that concerning the State of Siege (*estado de sítio*) which is to be declared in case of external aggression or of internal troubles, "when the security of the Republic requires it." These dispositions were much developed in the Constitution of 1934 and of 1937. The latter, through its Arts. 166 and 186 made it possible in practice for the President to suspend most of the individual guarantees of the citizen.

1946. This Constitution reacts against that tendency by reducing, except in cases of real and grave emergency, the President's right to declare the State of Siege, and re-establishes the privilege of Congress to approve or eventually lift the State of Siege. (Arts. 206-214.)

Economic Dispositions.

1891. This Constitution, like most of those of the 19th century, contains other statements about the rights of ownership, freedom of industry (except as to the Mining Industry, which only now has become a most important factor in Brazil), than features of a "social" character, as it is understood now.

1934. The Constitution contains a special Title (IV) "of the economic and social regime," which tends towards Italian and Portuguese views. Its general character is, however, rather nationalist than socialist, as it makes a number of rules to bring certain key-industries under Brazilian ownership as against foreign holders. (Arts. 115, 120-137.)

1937. The influence of Italian, Portuguese, and German ideas becomes reinforced, by endeavouring to make Brazil into a corporative State, and submitting the whole of its economic life to the control of the Government—practically of the President. It is only natural that the War, with its possibilities for a country with great natural riches, should have brought a considerable development to both agriculture and industry, and the practical influence of the system of government became less apparent than in peace time.

1946. The fifth (V) title of this Constitution retains a number of solutions which were tried in the 1934 and 1937 Constitutions. There is still a possibility

of State intervention, but the Constitution tries to combine guarantees of individual rights with the interests of the State. While the Constitution of 1937 had absolutely barred strikes and lock-outs (Art. 139 al. 12), that of 1946 recognizes a right to strike, within the limits of a law to be enacted (Art. 158).

This whole part of the Constitutions of 1934, 1937 and 1946, would require an extensive comparison; its result would probably be that the Constitution of 1946 shows less of a different economic and social attitude than of a different general outlook.

Family, Education, Culture.

1891. These are not preoccupations of the first Republican Constitution.

1934. Perhaps the most striking feature is the fact that the indissolubility of the marriage tie, which was already a part of the Civil Code of 1916 (Arts. 315 ff.) was fixed in the Charter of the Union.

The Constitutions of 1937 and 1946 contain a number of articles for the protection of the family, notably of the less fortunate, for the improvement of the situation of illegitimate children, and sundry dispositions which do not require a comparison.

Education.

All three of the new Constitutions make provisions for a raising of the standard of education, which in a country with little density of population, and until very lately quite insufficient communications in the Interior, could not yet overcome a high percentage of illiteracy.

The three newer Constitutions improve on one another in correcting this state of facts.

That of 1946 provides in its Art. 170 for a Federal System of schooling, which is to be applied first of all in the Territories, which are under Federal law in most respects. They are not so well developed as other parts of the country, owing to their geographical situation and lack of means. The Federal System is to be applied in other parts of the Union by way of supplement, strictly within the limits of the local deficiency (*nos estritos limites das deficiencias locais*). Otherwise the States and the Federal District will have their own systems of Education, to which the Union will contribute financially.

This system acknowledges State autonomy, and supplies its deficiency by financial contributions. (See also Arts. 171, 172.)

The last two Titles (VII and VIII) of the Constitution of 1946 deal with the Army and with public officials. A comparison with former Constitutions does not appear to be of general interest.

ADAT LAW IN INDONESIA

[Contributed by MAX GLUCKMAN, ESQ.]

THE compilation of the laws of the "primitive" peoples encountered during European expansion into Africa and Asia was undertaken early in the process of colonization. In most areas, administrators found it necessary to record indigenous law to carry out their duties, and as colonial governments began to recognise native customary law they appointed Commissions or individuals to investigate it. Scholars in Europe encouraged residents among the peoples to report on native law, and many theoretical analyses were made of this material. Yet despite these writings, there are few good books on "primitive" law. In general few lawyers or anthropologists have been successful in treating this aspect of native life. Lawyers seem to an anthropologist to fail because they are too rigid in their application of categories, and lawyers complain that anthropologists' records are inadequate. As an anthropologist I feel anthropologists fail because they lack good categories.

Unfortunately, one of the largest bodies of data on, and analyses of, primitive law has been available to only a few scholars who could read Dutch, that of the

Dutch students of the *adat* law of Indonesia. Therefore the translation of the standard textbook¹ on *adat* law is very welcome, and we must hope that it is the harbinger of others. Unless these follow, the work of Dutch scholars cannot influence, as their merit justifies, English, American and Continental workers.

The term *adat law* (in Dutch, *adatrecht*) has been adopted in Indonesia to describe what in British colonies is called "native law and custom". It is from an Arabic word meaning "custom." The select bibliography at the end of the late Professor Ter Haar's book shows how much work has been done on it, as also how much remains to be done; and the book itself is proof of the value of these studies.

Ter Haar's book in itself, though worthy of careful reading, cannot make available to those who do not read Dutch this wealth. From his preface, we learn that "this book has been written for beginners in the study of *adat* law, particularly for students of the Law College (of Batavia); it will give a general idea, which can make the study of the positive *adat* law of a particular law-area more fruitful; it will at the same time show field workers the general framework of the *adat* law with which they have to deal in their particular work." Ter Haar, therefore, assumed that his readers would be acquainted with the economies and cultures of the peoples whose law he was summarising, and with political, economic and other developments under Dutch rule (on which Furnivall has written the standard work, *Netherlands India*, Cambridge, 1939.) Very few readers of *Adat Law in Indonesia*—and there should be many—have this background. The very short, highly compressed accounts of "The Ethnological Background", "Law in the Native Culture", and "The Place of *Adat* Law in the Legal System" (of the Netherlands Indies) written as the Editors' *Introduction*, are inadequate.

In fairness to Ter Haar, his book should be reviewed as written for his students who could refer to the background literature. But here I shall partly assess it in its present form, as the only substantial English translation from this literature. I hope that my criticisms of that form (which are not always criticisms of Ter Haar's analysis itself) will help to encourage the Institutes which sponsored its publication, to make available to us translations of other studies of *adat* law.

Adat law has been recognised by the Dutch authorities for many years, and scholars exerted their influence in procuring this recognition; it is administered, with other systems of law, in a complex framework of courts.

There is a general system of *adat* law in Indonesia, within which the Dutch scholars have recognised approximately a score of sub-systems, "law-areas", which are "cultural-geographic units" for classifying "systems of *adat* law that are comparably similar within the greater body of Indonesian culture" (Editors' Introduction pp. 5 ff.). The Editors give a list of these areas but do not summarise their characteristics. Ter Haar in his book does not specifically contrast or work on these law-areas; he sets out the main principles of *adat* law for the whole region, citing examples and variations without set order or obvious purposive selection. This procedure is partly forced on him, I gather, by the patchiness of reports on various areas, but it follows partly from the mode of his analysis.

Thus he does not work with the basic unit of the law-area, which is apparently a cultural classification. Nor does he group peoples and their systems of law according to their economies; indeed, we are given no account of economic factors, or of the differential influences of Western economy on various areas. Ter Haar's introduction is a classification of social organization into thirteen types of "autonomous legal communities". The connotation of the term "autonomous legal community" is not made clear: it appears to refer variously to villages, districts, chiefdoms, in different contexts. Its significance may be clear in Dutch, but it

¹ *Adat Law in Indonesia*. By B. Ter Haar. Translated from the Dutch by G. C. O. Haas and M. Hordyk. Edited with an Introduction by E. Hoebel and A. A. Schiller. (New York: Institute of Pacific Relations. 1948.) xiv + 255 pages. Index. \$4.

sounds strange in English: I suppose our equivalent would be "independent political (legal) units".

The internal structure of these communities, as everywhere, is almost always based on local association. "Autonomous communities in which the territorial factor, the common concern with a defined area, has no significance are rare and unimportant" (p. 50); but there are numerous communities in which co-residence is the only bond of unit; and in most areas, the members of a local community are related to one another by real or fictitious kinship ties. In the last type of communities, the patterns of kinship ties between members vary: in some the core of a local unit is an agnatic lineage, in others it is a matrilineal lineage, in others the ties are those of cognatic relationships of various kinds. A few peoples have double unilateral descent, i.e. agnatic and matrilineal lineages exist and possess different rights, but obviously only one of these lineages can be a co-residential unit. Where the unilateral corporate group exists, ties with the kin of the other parent are always important. Groups of this kind form "autonomous legal communities", whether their dwellings are grouped in villages or scattered over "districts"; their members feel and act as groups in relation to each other and to outsiders. Sometimes the position is complicated by conquest by aliens who became aristocrats and placed officials in charge of areas. However, except in a few areas this type of small community, recognising intensive bonds between its members, living and dead, and with its land, which are often cast in magico-religious terms, is found throughout the region. The community settles disputes between its members and with outsiders. Ter Haar's presentation of this background of social organization is clear and concise.

Against it, he considers rights to land and chattels, land transactions, obligations (other transactions), the law of persons (status, relationship, marriage, inheritance), with very short sections on delicts, the time factor in *adat* law (prescription and limitation), legal terminology, and precedents and the judge. (Unfortunately, it is not always clear whether he is writing of local native judges or of judges appointed by the Dutch Government.) His procedure is to state general rules and illustrate them, in a range of variations, by citations from various societies, indicating the social milieu in general terms, as perhaps: "among the patrilineal Toba-Bataks . . . but among the matrilineal Minangkabau" I doubt whether this mode of analysis can have been satisfactory even for Ter Haar's students; and it is certainly unsatisfactory for the general reader. One does get a general idea of the principles of *adat* law, but the total effect is disjointed. One is left with an impression of a lot of tribal names, of whose siting one is uncertain, who practise various similar customs. Above all, this mode of analysis must fail to bring out, if it exists, the "organic functional structure" of *adat* law, which was Ter Haar's aim. To achieve this, he would have done better to show, over a range of selected communities, how far each sub-system of *adat* law is internally consistent with its local economy and social organization, and can be interpreted in the light of those determinants, as well as by its internal logic and unique history. He could then have concluded with a statement of the general principles emerging from those analyses. As the book stands, we can only distinguish by an effort of re-analysis how land rights vary in hunting and agricultural communities, or on fields cultivated in perpetuity and on fields cultivated by slash-and-burn methods. Similarly, though under marriage and inheritance we see the varying results of, say, agnatic and matrilineal lineage structure, in each of these realms of action, we have ourselves to relate the actions in each type of structure. For a social anthropologist this is not very difficult, but I suspect that it will not be easy for those who are not familiar with this type of society. Ter Haar's method also excludes a consideration of the economic basis of legal rules.

This criticism of method arises from the whole approach of modern sociology and social anthropology, which have turned against the wholesale citation of customs from many cultures to the comparison of processes of interaction within

groups of similar or different social structure. A parallel with the former method might be the attempt to write a study in comparative jurisprudence, before separate studies had been made of Roman, Roman-Dutch, English, etc., legal systems. Had Ter Haar presented, even in outline, accounts of legal rights and duties in one of each of his thirteen categories of communities, we could have seen whether *adat* law in fact has an "organic structure", and whether there are common principles within the whole area. The importance of this "organic structure" is stressed in Ter Haar's discussion of "The Task of the Judge", where he emphasises that the judge should know the whole social and cultural milieu.

It is extremely likely that there are general rules which are determined by the economic and social setting. For what strikes me, as an anthropologist whose special province is Negro Africa, is the fundamental similarity between *adat* law and African law. It does seem as if the limitations of primitive economies, and the organization of small local communities on a framework of kinship ties, produce similar legal rules. Land-holding, marriage and inheritance, transactions, reactions to injuries, are controlled by the same sanctions. For example, Indonesians, as in Africa and early European history, generally distinguish between earned property and inherited property. The earner may freely dispose of the former, but not of the latter, the devolution of which is controlled by set rules. But once earned property is inherited, it becomes "family property". Again, in Indonesia, as in Central and South Africa, changing economic conditions and increase of population seem to have produced the same result; the right in land which is stressed is that of all members of the community to some arable land, so that chiefs reduce the period of permitted following and take over individuals' unused land or fallows for re-distribution to the landless.² Ter Haar describes this as an encroachment of the autonomous legal community's "right of disposal" over the land, on the individual's "native possessory right"; but its origin lies in the latter right as part of the community's obligations to all its members.

This brings me to what is undoubtedly one of the most important contributions of the students of *adat* law—their policy on terminology to which Ter Haar devotes a special chapter. The task of translating rules of one society into a language intelligible to members of another society is basic in all social studies; when translation is from the language of the "primitive" people into a modern European language the difficulties are enhanced. We do not have words for many of their concepts. Ter Haar puts the problem clearly and poses the three possible methods of dealing with it: (1) to seek for the nearest equivalent; or (2) to continue to use the native terms; or (3) to coin "neutral" terms in the recipient language. In a way, it is irrelevant what is done, so long as the terms used are clearly defined. All three methods may be successful with different concepts. Native terms are usually burdensome, especially if many are used, and they have limited application unless they can be Europeanised. *Adat* law is less cumbersome than, and avoids some of the pitfalls of, the phrase "native law and custom"; but could it be applied to African law? *Levirate* is an example of a term which can be applied precisely in many societies. Ter Haar concludes that when in doubt it is best to seek for a neutral term, and I agree with him. British anthropologists have failed to reach unanimity on the same problem. Thus they had a long controversy over how to describe payments made by a groom for his bride. "Dowry" was used by some writers but is clearly inapplicable; "bride-price" carried the connotation of sale of the woman which was not in fact present; "bride-wealth" was suggested as a neutral term and used by most, but not all, anthropologists. Now "marriage-payments" is coming into use. When senior *adat* jurists, like Van Vollenhoven, have suggested neutral terms, the method they seem to prefer, these have been adopted by everyone. They even use as an alternative term for *levirate* (where a dead man is still married to his widow but she cohabits with a kinsman) *substitution marriage*, with *continuation marriage*

² Cf. Gluckman, M. *Essays on Lozi Land and Royal Property*, Livingstone: Rhodes-Livingstone Paper, No. 10, 1943, p. 48 ff.

as an alternative for *sororate* (marriage to the deceased wife's sister without further transfer of goods.)

They have applied neutral terms particularly to land-holding and land transactions. The concepts of "communal ownership" and "individual ownership" of land in tribal society have often been posed as mutually excluding alternatives, and this false opposition has led not only to the waste of much polemic and paper, but also to decisions in courts which seem unjust, notably on the Ndebele land in Southern Rhodesia after conquest.³ The Dutch scholars see that communal and individual rights exist at the same time in the same parcel of land, in what Ter Haar calls a state of tension. The community's rights were described by Van Vollenhoven by the term "right of disposal" (cf. the French "*droit du disposition*"). "Yet, even this term is etymologically misleading, because no actual right of alienation is vested in the community," says Ter Haar. Van Vollenhoven stressed this, and carefully described the six characteristic features of the right of disposal. This right "is never static. It grows and shrinks in relation to the rights of individual members." By working on a parcel of land, the individual creates a legal relationship between it and himself which is termed "the native right of possession", and derogates from the right of disposal. This native right of possession is quite different from the rights which in developed systems of law are termed usufruct and use, though many writers have applied these to primitive land-holding. Again, Van Vollenhoven (and here Ter Haar) carefully described the powers and duties entailed in the native right of possession: this chapter is the best in the book. The terms, community's "right of disposal" and individual's "native right of possession", particularly the latter, seem to have been selected for their innocuousness rather than their appropriateness, for lack of better terms, and they do not indicate the nature of the rights and duties entailed in them or the relation between individual and community rights. They appear also to have led to the idea that the community's rights in the land are lessened by the individual's rights, and to have produced a somewhat confused account of the struggle between these rights. Therefore I may perhaps be excused if I set out here a terminology I have suggested for similar rights in Africa.

The essence of land-holding in tribal society is that it is a part of the individual's status: as a member of a political unit and within that as a member of a local-kinship group, he has a right to some land in its demesne. Therefore I think "estate" is the appropriate term to describe this right, and speak of the individual's "estate of holding." These estates of holding are held in the hierarchical organization of the society, and an estate-holder has a duty to allot land within his estate to his dependents who have a corresponding right to claim land from him. Ultimately rights in the land vest in the community, perhaps through its chief, who has to divide it into estates. The community or chief may therefore be called "the owner as trustee" (some have suggested "the warden"), who divides the land into "primary estates of holding of primary holders", who are either sub-chiefs, village headmen, or groups within the political unit. Primary holders allot secondary estates of holding to secondary holders, these allot tertiary estates of holding to tertiary holders, and so on. All these estates may exist on the same parcel of land at the same time, and the use of the single term, "estate of holding", brings out the identity of rights and obligations between holders of adjacent estates of holding at all points in the series, as well as to all superior and inferior estate-holders within the series.⁴

Lawyers may find Ter Haar's references to "the magical balance" in communities, "the cosmic equilibrium", "the magical bond" between land and people, the relation of "the life-circles of individuals" and "the magic life-force of the community", somewhat metaphysical. I do myself, since Ter

³ See Ter Haar, p. 81 ff, Cf. Wilson, G. *The Land Rights of Individuals among the Nyakyusa*, Livingstone: Rhodes-Livingstone Paper No. 1, 1938.

⁴ Gluckman, *Essays in Lozi Land and Royal Property*, p. 27 ff.

Haar describes, but does not show the significance of, the social relations which are basic to these conceptions. For peoples at this stage of culture, the social and natural world has a moral and ritual order, interdependent with the social and natural order. Any disturbance of ritual forces tends to upset the social or natural order, and conversely any upset of the social or natural order is ascribed to ritual disturbances. Misfortunes—famine, illness, accidents, etc.—are ascribed to the wrath of gods or ancestor-spirits, or to witches or sorcerers. In some African societies all misfortunes, not merely injuries patently inflicted by others, are delicts, for they originate legal actions, accusations of witchcraft against neighbours. Even death in war at the hands of an enemy, may found a suit for witchcraft against a neighbour.⁵

Ter Haar, in his very brief chapter on delicts, does not mention these relations with supernatural agents. But he indicates that not only delicts, but also sales, particularly of land, or incidents of personal history such as marriage, are disturbances of the social order which tend to upset the moral and ritual order of the world. Therefore there is a ritual side to land-holding and land transactions, to alterations of status, to settlements of injuries, etc. This conception can be related to the basic economic and structural conditions of static, undifferentiated societies.

Despite its weaknesses, the book is intrinsically a sound, scholarly study. But it will be still-born unless it is followed by translation of Ter Haar's sources. If these are made, I hope the editors will check the translators more carefully. Good as the literal work is, there are unhappy phrasings (such as "different than") and many sentences are too involved for the English ear and eye. Some words are excusable only because the dictionary approves them, as "necrology" for "obituary." Untranslated Indonesian or Malay words are too numerous, and a glossary is needed.

THE DUALISM IN LAW

[Contributed by PROFESSOR R. H. GRAVESON]

PROFESSOR ALF ROSS, the Danish legal philosopher and authority on international law, already has the unusual distinction of having published in England a textbook of international law. The thesis of his present work, "Towards a Realistic Jurisprudence,"¹ is the view that "the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied pre-scientific concept of law which more or less forms the basis of the theories developed." (Page 11.) By this he means that law is conceived at the same time as an observable phenomenon in the world of facts and as a binding norm in the world of morals or values; in short, as both a phenomenon and a proposition. One cannot hope, in the author's view, to propound an adequate or convincing theory by adhering strictly either to reality or to validity; while the traditional combination of both methods usually has the effect of concealing the inherent dualism.

Ross develops a hypothesis based on the conclusions of his earlier work,² that "reality and validity are not logically co-ordinated categories of forms of thought," validity being merely a word used as a common term for such expressions as those by which certain subjective experiences of impulse are rationalised. Validity, in other words, does not exist as an absolute and independent concept, but merely as a psychological reaction. In the author's words, "there do not exist any conceptions of validity whatever, but merely conceptually rationalised experiences of validity." (Pages 12-13.) This seems,

⁵ See Evans-Pritchard, E. E. *Witchcraft, Oracles and Magic Among the Azande*. Oxford: Clarendon Press, 1937.

¹ *Towards a Realistic Jurisprudence*, by Professor Alf Ross. Copenhagen, Einar Munksgaard, 1946. Pp. 304. Price, Danish Crowns 18.

² *Kritik der sogenannten praktischen Erkenntnis* (1933).

however, to be little more than a play on words, for was it not a Prince of Professor Ross's own country who spoke words to the effect that there was nothing either good or bad, but thinking made it so?

While Professor Ross convincingly maintains that the common concept of law has come into existence by an intimate fusion of notions of validity with those of reality, leading to a dualism and antinomies throughout the whole field of law, the "realism" of his approach is evident from his attempt to reconcile these two factors by treating validity itself as reality; that is, as a factual psychological manifestation of the feelings of man in society. As distinct from the American realist school,³ which evades dualism but does not conquer it, Professor Ross leads to an expanded realistic jurisprudence through his translation of validity into a realistic fact of legal experience. The author is, perhaps, a little unfair to the American realists if he may be taken to suggest that their theories are based on the exclusion of psychological factors, of which validity is one; for Jerome Frank, particularly, in his "Law and the Modern Mind," has taken great pains to show that the idea of certainty in law is psychological; and the ideas of certainty and validity are not far apart.

Realism and natural law may be thought to have nothing in common. Not so for Professor Ross, who maintains that "positive law is not a thing apart, different from natural law," for positive law is not conceived as an independent empirical fact derived from the state as an historical phenomenon, but as a further development and manifestation in the world of sense of the original natural rights. The contrast between positive and natural law accordingly does not lie between empirical reality and normative validity.

On the foundation of the inherent dualism of law, the author proceeds to consider various antinomies in the form of contradictory legal propositions, starting with the contrast between legal dogmatism and social theory. Some of his remarks relating to law as a product of power strike one as a little unreal; his treatment, for example, on pages 62 and 63, suggest that power rests primarily on man's acceptance of its exercise as being based on something higher than mere compulsion; an attitude which fails to comprehend the acceptance of purely physical and non-legal compulsion such as occurred until recently in Continental police states. "It is impossible," Ross maintains, "to explain law as a product of power, without at the same time being obliged to explain power as a product of the law" (page 63). A little later, however (pages 82-83), he somewhat contradictorily maintains that as the actual system of power establishes itself as valid, legitimacy reacts upon it to specialise and reinforce it, and to turn it into the legitimate enforcement of a valid constitution.

Again, in his criticism of Gray's theory, Professor Ross shows inadequate appreciation of the law-making effect of a single precedent in the English system, and employs an unfortunate metaphor in his remark (page 67), that "rules cannot come into question until we consider a number of decisions—in the same way as only a multiplicity of points will determine a curve." For every point is at least part of a curve, and only two are needed to fix a straight line.

The author attempts to dissolve the antinomies which he has discussed, and to reconstruct the concept of law. But while one is convinced that the antinomies he mentions exist in legal theory, there remains at least a doubt as to whether they are essential to or inherent in the concept of law. In passing from proof of the dualism and its antinomies to a dissolution of them, Professor Ross does not show us why such a process is necessary, and only achieves his purpose by going beyond human consciousness into psychology. In this he may well be justified, and supports his views by resort to the eminent authority of Orsted, and particularly the latter's exposition of religion and honour as the motives of obedience to law. Law for Professor Ross is "a revelation of a mystical idea

³ If one may still properly call it a school of thought—see Judge Frank's preface to the sixth printing (1949) of his *Law and the Modern Mind*.

(force), in the world of physical reality" (page 91), and the legal system, "a social order characterised by having its foundation in peculiar behaviour attitudes such as are at the same time expressions of interested and disinterested impulses, and have taken their rise, developed and established themselves by an inductive interaction between two motives, a fear of compulsion, and a belief in authoritative validity" (pages 89-90).

Professor Ross rejects the assumption made by various schools that the propositions of positive law and of jurisprudence are of the same structure, maintaining on the one hand that the forms of positive law have a special normative purpose, namely "as rationalisations of certain experiences having a stamp of validity", whereas jurisprudence itself is not normative, but a science of facts. Professor Ross's definition of jurisprudence (page 107), as "a doctrine relating to man; man as a centre of reaction in a certain social system of intercourse, and not merely relating to a system of propositions," is sociological realism, but it is a definition which might apply equally well to religion, politics or economics.

The author's realism becomes less of a term of art in his explanation of the manner in which natural factors influencing judicial decision become positive through the specific exercise of judicial discretion. He fails, however, to reach the conclusion that the reality of law is not different from the validity of law in a generic sense, but is merely a concrete application of the general idea of validity.

The author then deals with dualism in the doctrine of legal sources and legal method, maintaining a thesis which in many respects is reminiscent of the American realist school. One can only hope to understand a legal system by understanding how it has been created, and in so doing by appreciating the ideas and techniques of the law maker. While Ross satisfies one that there has been an almost universal and permanent confusion between the ideas of reality and validity, it does not follow that the separation of these ideas will assist in understanding the growth of law, since the confusion represents, in fact, the mental approach of the creators of our legal system. The author's Continental approach to customary law emerges in his treatment of it as "the semi-authoritative, semi-fixed directions which emerge from precedents" (page 143); a view of both custom and of precedent which must appear confused to the English lawyer.

The last part of the book is devoted to an acute analysis of obligations and rights, real and personal, including some valuable observations on omission as a legal concept (page 176). Ross follows the modern trend in maintaining that duties are a more important concept than rights, but with realistic realism he sees that while, in a formal case, duties are more important, from the point of view of content rights are often primary, in that duties are established to secure the specific content of the right.

The author's Continental background and approach are apparent in his careful analysis of the nature of real and personal rights, in which he has been greatly influenced by Hägerström's researches into the mystical nature of early Roman Law, a foundation of which he makes good use in showing the relation between early mysticism and the modern idea of validity in law, e.g., the magical properties of formal words in conveyancing.

The author's conclusion is that the fundamental difference in nature between real and personal rights "depends on whether they express an actual and therefore necessarily individually and directly determined status of property, or merely a potential and therefore necessarily abstract and indirectly determined change of property, which must one day become actualised in a new definite status of property" (page 286). It is a hypothesis which he propounds with some diffidence, and for which he finds historical justification in the earliest records of legal transactions on the Babylonian tablets.

Professor Ross, a realist who scorns neither sociology nor history, has made

a great and stimulating contribution to juristic thought in this book. It may well be that criticisms of his views have been based on some misunderstanding, for despite an excellent translation from the Danish by Miss Fausboll, the book is not only by the nature of its subject matter difficult reading, but ideas are so often incapable of adequate translation from one language to another. English jurists are greatly indebted to the author and his translator for the trouble they have taken in producing an amended English edition of the book, which opens for perhaps the first time a window on Scandinavian legal thought.

HISTORY OF ENGLISH CRIMINAL LAW

(Contributed by E. R. GUEST, ESQ.)

THIS enormous volume,¹ covering the years 1750 to 1833, is the first of several which are projected; it is perhaps unfortunate that it should have to be reviewed as an isolated unit because some conclusions now made may not seem valid when the work is complete.

Most readers, as they close this volume, must wonder why, if it includes all that the author intends to write of this period, the whole work has been given the title that it bears. At page 377 there appears this quotation from Bentham's *The Limits of Jurisprudence Defined*: "It can not but have been observed that nothing is more commonly to be met with, not only whole chapters but whole volumes and those authoritative too, in which from the beginning to the end there is not so much as a syllable hinted about punishment, and which, notwithstanding, are full of assorted matter which is called law. This makes a seeming inconsistency, which it will be well worth our while to endeavour to remove." This inconsistency has been inverted by Dr. Radzinowicz. In his present volume there is little mention of any of the developments which mark the legal history of this period except those concerning the rise and decline of the capital sanction. For example, *Hadfield's case* (27 St. Tr. 1281) and the consequent Criminal Lunatics Act of 1800 are not mentioned, nor any of the developments of the law of insanity as affecting criminal responsibility. *Lord George Gordon's case* (21 St. Tr. 485), a landmark in the law of treason and important in the history of the law of evidence, does not appear. Nothing is said of the 18th century developments in the law of criminal libel, culminating in Fox's Libel Act (32 Geo. 3, c. 60.) Procedural changes are also largely unnoticed. Even the important provisions of 7 Geo. 4. c. 64 affecting the form of indictments (and also the responsibility of accessories before the fact in felony) are not to be found.

The omission of these and many other less notable developments which would normally be mentioned in a history with the present title is, except in relation to that title, unimportant. But as this volume really traces only the history of punishment some avoidable disappointment is inevitably caused to those who had hoped, from the general title, to have found a successor to Sir James Fitzjames Stephen.

But considered purely as what it is the book is quite remarkable. Its bibliography alone fills 50 pages and shows that the author has consulted all the available relevant Parliamentary debates and papers for the period, as well as every conceivable book, tract, article and periodical dealing with criminal law. In addition he has digested most of the biographies of and critical studies concerning the judges, legal authors and political figures active in these years, and many works dealing more generally with their social and political background. As well as all this he has read about eighty works of foreign contemporary impressions of the English legal system, some in translation and some

¹ *A History of English Criminal Law and its Administration from 1750* Volume 1. The Movement for Reform. By Leon Radzinowicz, M.A. (Cantab.), LL.D. (Cracow), LL.D. (Rome). Published under the auspices of the Pilgrim Trust by Stevens and Sons Ltd. London, 1948. xxiv and 853 pp. Price £3 10s.

in French, German or Italian. In all, this amounts to thousands of volumes and is evidence of monumental industry. The object with which he undertook it was set out in an article in the *Cambridge Law Journal* for 1943. "The examination of (this) material has led us to the conclusion that, roughly speaking, English criminal legislation has passed through . . . stages. We can distinguish three main periods. The first period would cover the years 1760-1830; the second 1830-1895; and the third 1895 to the present day.

"Although the survey will be based on the State papers, Parliamentary debates and legislative enactments, other sources of criminal science and certain important works dealing with political and social development have also to be taken into account. . . .

"It seems to us that such an investigation if successful, would produce a comprehensive history of English criminal legislation. Volume 1 would comprise the Sources, in which the whole material would be grouped . . . so as to present the foundation of the survey and make it possible for other students to carry out further investigations. Each of the three successive volumes would be devoted to the exposition of criminal legislation in each of the periods above mentioned."

"The Movement for Reform" is the second of the volumes above projected and from one point of view the story it has to tell differs little from that in chapter 13 of Stephen's History. History being history, this is natural. But from another point of view nothing like this volume has ever been made available to the happy student before. Here in one vast panorama are displayed all the conflicts and convolutions of public, legal and political opinion which were the motive power of change, and a map of the facts through which that developing opinion had to trace its course.

Some of these facts are rather unexpected. Thus, with a practically universal capital sanction and a disquieting amount of crime, there seem in the 18th and early 19th centuries to have been comparatively few sentences of death and still fewer actual executions. Whatever theory they held of the social necessity of capital punishment as a deterrent, most people, when faced with it, revolted at accomplishing a fellow creature's death. This reluctance seems to have affected alike the victims of crime, grand juries, petty juries and the judges, and to have influenced even the Crown in the exercise of the prerogative of mercy. A petition to the Commons from the Corporation of London in 1819 prayed moderation in the following terms: "Showeth . . . That many injured persons have refused to prosecute, because they cannot perform a duty which is repugnant to their natures, by being instrumental in the infliction of severity contrary to their ideas of adequate retribution; and by such impunity young offenders, instead of being checked in their first departure from virtue, are suffered to advance from small offences to crimes of great atrocity.

"That some jurymen submit to fines rather than act as arbiters of life and death in cases where they think the punishment of death ought not to be inflicted.

"That some jurymen are deterred from a strict discharge of their duty, and acquit guilt or mitigate the offence so as not to subject the offender to the punishment of death, and thus assume a discretion never intended to be vested in juries, and relax the sanctity of a judicial oath, upon which the integrity of the trial by jury much depends.

"That this determination by juries to oppose the severe enactments of our laws is of daily occurrence.

"That, amongst other instances, a jury, rather than be instrumental in inflicting the punishment of death for larceny to the amount of 40s. from a dwelling house, found a £10 note to be worth only 39s.

"That another jury, influenced by the same motives, found two bills of exchange, value of £10 each, and eight bank notes value of £10 each, worth the same sum of 39s.

"That your Petitioners cannot omit to urge upon your Honourable House, that even this disinclination to enforce the law is not confined to the injured parties and to the juries, but extends to the learned judges, who, impressed with a similar feeling, have exercised their ingenuity in discovering means by which the real value of stolen property should not be found by the jury; and where convictions have taken place, constantly recommend a great part of the convicts to the royal mercy; and His Majesty's advisers, influenced by the same anxiety to preserve human life, readily apply and easily obtain from the throne a remission of the sentence." (p. 729.)

Illustrating this tendency by figures, Dr. Radzinowicz, at p. 92, shows that between 1805 and 1810 out of 28,608 committals for trial in England and Wales, grand juries returned no true bill in 4,928 instances. In a note at p. 93 he adds "The number of acquittals and of no true bills found (for the same years and area) amounted to 11,624, or between one third and one half of all the committals for trial." When to this are added the cases of pious perjury by which the fatal maximum of 40s. worth of stolen property was avoided, of which striking examples were set out in the petition noticed above, some estimate can be made of the very large number of cases in which the law was avoided out of distaste.

The judges, by the strictest (and often the most artificial) construction of penal statutes reduced their incidence as far as (often beyond) the bounds of possibility. Among the most interesting sections of this book are those (ch. 3 and Appendix 1) in which the learned author examines, in detail, this process for various statutes.

In spite of all these stratagems, a certain number of persons were sentenced to death. But even at the harshest stage of the years under review by no means all of them were hanged. Figures for London and Middlesex show (p. 151) that between 1749 and 1758 527 death sentences resulted in only 365 executions; later, when figures were first abstracted for the whole of England and Wales, it appears that 2,224 people were sentenced to death between 1805 and 1810, but only 354 executed (p. 153). The differences were accounted for by the exercise of the Royal prerogative of mercy.

Thus a criminal system distinguished by the harshest sanctions in Europe is found in practice to have produced a very moderate amount of slaughter. This, together with the liberal nature of English criminal procedure seems to have puzzled foreign observers, who, however, concluded that the two extremes balanced. As the learned author says at pp. 26-27, "It may well be contended that the aspect of eighteenth century English criminal justice which attracted the keenest interest among contemporary foreign visitors was criminal procedure. Their diaries, letters and recorded impressions of travel contain much information on the English mode of prosecution and trial. The tone of these documents is invariably one of genuine admiration, not unmingled with wonder at how such a system could be reconciled with the exigencies of an effective defence against crime . . . There was thus some foundation for the opinion that the unparalleled liberality of English criminal procedure warranted the imposition of a very severe system of criminal law. The basic argument of the exponents of this view, which often influenced the legislature to pass capital statutes, was that countries in which prosecutions and trials are ruthlessly and often unscrupulously conducted may afford to have a rather lenient penal code, but that whereas in England, the rights of the accused are so well safeguarded, the punishment of those found guilty should be exemplary."

Today, this conclusion seems too superficial, and indeed immoral, for serious consideration. The contrast now points the question why in the face of so strong an individual opinion against the widespread sanction of death, reform was so bitterly opposed and so slowly achieved? One interesting answer is suggested by Dr. Radzinowicz at pp. 351-352. "Among the effects of the Industrial Revolution were the emergence of great urban agglomerations and

industrial regions, the formation of a large and mobile class of wage earners, the disintegration of some of the ancient orders of society and the rapid accumulation of wealth by some sections of the community coinciding with the spread of poverty and economic instability the evils of which were accentuated by the lack of a protective social policy England was in a state of transition and it is a truism that in such periods of social tension the Legislature becomes overwhelmingly preoccupied with the strengthening of the state against the danger of an anticipated wave of lawlessness, inclined to lay stress on the deterrent functions of criminal law and to oppose any attempt to change the established system of criminal justice, particularly if it would entail the relaxation of its severity." In a society in this condition it was perhaps natural that many of the same people who in individual practice shied away from any contact with the capital sanction held with passion to the theory that its retention was essential for the security of a society and constitution which they valued.

Dr. Radzinowicz's book has made a new and invaluable contribution towards an understanding of this period. Here are marshalled for the first time, from sources which the ordinary student has neither the leisure, inclination nor aptitude to search, all the arguments, prejudices, facts and fancies which operated upon public opinion and were urged upon Parliament during the long struggle for reform. Without knowing these details, hitherto buried in the masses of material now searched, it has often been difficult to understand many of the developments in English criminal law. Without a full understanding of the past, the present is needlessly obscure. Most of the arguments for various reforms which are heard today turn out to have been used before, though not always to support a similar thesis. Recently, one of the strongest points of the abolitionists who moved to repeal the death penalty for murder was that the punishment, apart from all moral considerations, should be superseded on the grounds of inefficiency in that it did not deter. Thomas Fowell Buxton was saying precisely the same thing to Parliament in 1821, but in relation to its effect upon crimes against property. "The punishment of death is supposed to be necessary for the prevention of crime. Prevention of crime, then, being the only plea by which capital severity is considered to be justified, it becomes the only test by which it can be tried We have gone on long enough taking it for granted, that capital punishment does restrain crime; and the time has now arrived in which we may fairly ask, does it do so?" (p. 558, n. 14). In relation to such other crimes death is gone; but their prevalence is still the problem that it was thought and hoped a diminution of severity would solve. Today, faith is pinned to education and social betterment as weapons in the endless campaign against crime. Beccaria thought the same in 1763. At p. 283, n. 58, Dr. Radzinowicz summarises his views thus: "Beccaria holds that crime cannot be reduced by punitive measures alone but that its prevention depends largely on the manners of society, a wise economic and fiscal policy and good standards of education. He is also in favour of an efficient police system, the repression of idleness Finally he insists that the scope of criminal law should be reduced to a minimum, for, as he puts it, "to prohibit a number of indifferent acts is not to prevent the crimes that may arise from them, but is to create new ones from them." Since then English life has moved down these paths a distance that would have seemed unthinkable to the 18th century, but we are still saying as the King said to the Commons in November, 1751, "I cannot conclude without recommending to you in the most earnest manner, to consider seriously of some effectual provisions to suppress those audacious crimes of Robbery and Violence, which are now become so frequent, especially about this great capital, and which have proceeded in a great Measure from that profligate Spirit of Irreligion, Idleness, Gaming and Extravagance, which has of late extended itself, in an uncommon Degree, to the Dishonour of the Nation, and to the great Offence and Prejudice

of the sober and industrious Part of my People" (p. 415). At least now that this book has appeared, some of the more vociferous have less excuse for thinking that their panaceas have never undergone the test of time, and have to some degree failed.

Valuable as this work is, it is impossible not to feel that stern pruning would make it very much better. There is in the first place too much duplication. For example, pp. 42-48 deal in some detail, both in text and notes, with statutory provisions concerning housebreaking and larceny at various dates between 1531 and 1713. Very nearly the same material is set out in only slightly different words at pp. 634-636. One of the statutes, 39 Eliz. c. 15, is dealt with yet again at pp. 679-680. This kind of thing is frequent, sometimes, as in the case of 21, Jac. 1, c. 27, to the extent of quoting the act verbatim twice (pp. 431 and 629). Some simple statements are set out twice or more in the text itself, occasionally very close to each other, as the first 4 lines of text at p. 522 and the identical first four lines of the note 10 at p. 525. Not only does this kind of thing lengthen the work unnecessarily but it irritates the reader. After the full and admirable summary and estimate of Sir Samuel Romilly's early work and efforts contained between pp. 313 and 336 it is maddening to be told 63 pages later that "His work in this field (criminal law reform) is undoubtedly of the highest importance" and then to be referred to this footnote: "H. E. Barnes rightly describes Sir Samuel Romilly as 'the first great leader in the direct and persistent agitation for the reform of the English Criminal Code'; quoted by C. G. Oakes, Sir Samuel Romilly (1935), p. 11. Similarly Professor Coleman Phillipson says that 'his work occupies a place of supreme importance in the evolution of English jurisprudence.' Three Criminal Law Reformers (1923), p. 332. For an assessment of Romilly's contribution see above, pp. 313-336, and below pp. 497-525 (p. 399)."

Indeed the second complaint is against the quite excessive use of the footnote. Presumably these notes are not introduced in order to be ignored; but the reader who is faced with many pages on which the notes total at least a quarter of the print, some where they amount to half and a few which they almost fill must either ignore them or detach his attention constantly and for a substantial period from the author's thesis. If the note is relevant this is harmless but prompts the question why was not its substance embodied in the text and only the source noted? If it is irrelevant it is distracting and confusing, sometimes annoying. As about one quarter of this whole volume consists of notes, it is suggested that its value and continuity could be improved by some deletions in later editions. There are several categories to consider.

First, the purely pointless. Note 16 at page 455 is an example of this class. The annotated sentence of the text (referring to Dodd the forger) runs "Owing to Dodd's social standing, his fashionable life, his great popularity and the circumstances of his offence, the case at once became the sensation of the day." To this is appended fourteen lines of note; it commences "... all the materials of melodrama were present, and every man and woman in London was ready with pity or abuse." (*The Times Literary Supplement*, December 7, 1922.) What conceivable value can be attributed to a remark like this, and why print it in a serious work? The remaining 12 lines do nothing more than repeat, from a contemporary journal, biographical details about Dodd already fully and accurately set out at pp. 451-453, and add a few references to chit-chat about the case in popular contemporary publications. The reader would be better without any of this at all. But similar exuberance has allowed the insertion of many such lightweights—like note 45 on pp. 463-4—and the total waste of space is formidable.

A second suggested category is the general bibliographical note. Naturally a quotation must be assigned to its source. But in a volume with so splendid and well arranged a bibliography as that between pp. 736 and 787 what is the need for notes like that numbered 2 on p. 356? This monster occupies all but

3 lines on that page and spills over to p. 357 to the extent of 13 lines. It consists entirely of a bibliography of Bentham and Benthamism which the aspirant to further research can find for himself between p. 736 and 787, and which nobody else will want. To read it takes a prodigious time, but until it is read it is not possible to tell whether it enshrines anything necessary to Dr. Radzinowicz's text or not. There are many like it, and it would be a relief to be without them.

Biography is more debatable. There are very many notes indeed, some full some less so, sketching the lives of the secondary figures mentioned in the text. They lengthen the book exceedingly, and all the information they give could be found by anyone who wanted it in the *Dictionary of National Biography*. It is at least worth considering for later editions whether they advance affairs sufficiently to counterbalance the distraction from the even flow of reading. Quite certainly, however, these notes must be disciplined; at present there is too much complete irrelevance. Thus, at pp. 456-457 Dr. Radzinowicz deals with Dr. Johnson's intervention on behalf of Dodd. He says, "Johnson hardly knew Dodd, whom he had only met once many years before Dodd had committed the forgery." This simple statement is annotated by the following 16 lines: "Crocker quotes an interesting letter written by Dodd in 1750 to his friend the Rev. Parkhurst, the lexicographer, in which he mentions this meeting and makes the following remarks about Dr. Johnson: 'I spent yesterday afternoon with Johnson the celebrated author of the Rambler, who is of all others the oddest and most peculiar fellow I ever saw. He is six feet high, has a violent convulsion in his head, and his eyes are distorted. He speaks roughly and loud, listens to no man's opinions, thoroughly pertinacious of his own. Good sense flows from him in all he utters, and he seems possessed of a prodigious fund of knowledge, which he is not at all reserved in communicating; but in a manner so obstinate, ungenteel and boorish, as renders it disagreeable and dissatisfactory. In short, it is impossible for words to describe him. He seems often inattentive to what passes in company, and then looks like a person possessed by some superior spirit. I have been reflecting on him ever since I saw him. He is a man of most universal and surprising genius but in himself particular beyond expression.'" The fascination of this is easy to understand but its complete irrelevance is plainer still.

If some space is saved by the reduction of duplication and the omission of various classes of notes, a little of it could be used to clarify a portion of the work which is not at present as clear as is desirable. When dealing with the Waltham Black Act, Dr. Radzinowicz has not set out its text in any way which enables his interesting comments to be easily followed. Instead of the actual sections concerned, he sets out a kind of summary in headlines. But from his summary of the offences dealt with under the Act at p. 57, it is almost impossible to understand why he says in the text, "The simple appearance, without any other crime being committed or even attempted, by anyone with his face blacked or otherwise disguised in any of the places set out above constituted an offence under the Waltham Black Act Such is the actual meaning of this remarkable provision and such was the construction placed upon it by the highest judicial authorities." This passage is introduced by the heading "To appear armed and disguised in certain places" (followed by a list of the places). This causes instant doubt whether the relevant sections of the Act have been wrongly summarised or whether the judicial authorities were wrong in disregarding the provision that the disguised persons should be armed. Note 26 on the same page, which hints that the judges were wrong in that respect, appears at variance with the comment that "Such is the actual meaning of this remarkable provision." What is needed is a print of the Act itself to enable the reader to judge. Similar ambiguity exists in both text and "headlines" on pp. 58-59; from neither (without consulting the Act) is it clear whether the actions condemned each separately constituted an offence or whether it was necessary to be both

armed and disguised. The whole section treating this Act would be more convincing if the relevant sections were printed in full.

Another simplification for the reader could be effected without considering space at all. At present the arrangement of chapters is such that an account of Fielding's proposed reforms and of the work of the Committee of 1750 follow a long preliminary review of Romilly's efforts and a still more lengthy consideration of Bentham and his influence. This seems very much the cart before the horse, and leads the learned author to these rather unhappy phrases when finally he does come back to the earlier period. "The beginning of the movement for the reform of criminal law is usually associated with the name of Sir Samuel Romilly. His work in this field is undoubtedly of the highest importance. But in order to trace the history of the movement in all its stages it is necessary to revert to the middle of the 18th century when two important parliamentary committees were set up, when the extension of the scope of the death penalty was strenuously opposed on a number of occasions, and when several attempts were also made to repeal some of the capital statutes. In the course of these early endeavours, carried out in the face of strong opposition, men had arisen worthy to be called Romilly's precursors" (p. 399). The even flow of the story should be secured by inserting chapter 12 before the present chapters 10 and 11.

A final boon would be the printing, in future editions, at the head of each of the 100 odd pages of Appendices, of the number of the particular appendix dealt with in the page below; and, still more helpful, the showing at the head of each page of the bibliography which of the sections catalogued at page 736 is dealt with below.

All these criticisms are offered in a spirit of respectful admiration and in the belief that they point to certain ways of making this book yet more lucid and valuable. What is quite certain is that, altered or not, many more editions will be needed before there is competition of any sort in this new field which Dr. Radzinowicz has so industriously tilled.

A CONSTITUTION IN THE MAKING

[Contributed by A. G. P. PULLAN, Esq.]

THE difficulties which beset the labours of the framers of the new Constitution of India are indicated by the numerous criticisms already made of the draft from within, of which the most recent is issued by the Gokhale Institute of Politics and Economics.¹

The writer clearly regards the future State of India as a separate independent Republic having no connection with Great Britain or the British Commonwealth. But the framers of the draft Constitution had before them as a working model the Government of India Act of 1935, and were guided by that Act in adjusting the relations between the central government and the federated units, and in assigning powers to the President and the Provincial Governors.

The Government of India Act was based on the conception of the Crown as the Paramount Authority from which the Federal Constitution was derived, and the Crown was itself bound by the treaties entered into with the semi-independent rulers of the Indian States, who could only be brought into a federation with the Provinces of British India on terms different from those appropriate to federations composed of homogeneous units such as the United States of America and other possible models.

Faced with this difficulty, the framers of the draft Constitution preferred to leave the question of the internal government of the princely states for future consideration, and as a preliminary measure, in order to do away with the problem of the many tiny states, which under the Government of India Act had to club together to provide representatives for the Central Legislature, the

¹ *Some observations on the Draft Constitution* by D. R. Gadgil. (Poona: Gokhale Institute of Politics and Economics, 1948) pp ii, 112. 4s. 6d. Rs. 3.

interim government has encouraged the states to form groups under elected princely leaders. In this they have been to a great extent successful. With the recent formation of the Rajasthan Union with a population of fifteen millions, and the accession of the Maratha States of Baroda and Kolhapore to Bombay, there are now not more than a score of federal units under princely Government, and if these units are able to establish responsible government, the task of the constitution makers will be rendered easier. But states such as Hyderabad, Kashmir and Mysore are not unnaturally reluctant to put themselves under the control of the Union Government and submit to dictation as to their internal management.

Many of Mr. Gadgil's observations are directed to this problem. In the first place he points out the anomaly created by the fact that whereas a draft constitution is laid down for the units representing British India, the governance of the States finds no mention, and "the characteristics of these governments in the present or their modification in the future will not be governed by procedures mentioned in the Constitution and will not be subject to any limitations laid down in it." On the other hand he criticises the powers assumed by the Central authority to interfere with the affairs of the States.

As to the first point it is certainly true that if constitutional homogeneity is a necessary element in a Federation the draft constitution is so far defective. But it is not easy to see what other course was open to its framers. They had to unite under one central Government not only Provinces already trained to some form of Parliamentary Government, but also a great number of States ruled by hereditary autocrats, who were satisfied with their position under a Paramount Power, punctilious in the observance of their treaties, ready to lend experienced administrators to assist them, and interfering as little as possible in their dealings with their subjects. The subjects for the most part were loyal to their rulers and accustomed to their administration. They had no experience in and no desire for democratic government. Thus apart from the feeling that treaties should not lightly be disregarded, there was the further difficulty that the states were unlikely to enter voluntarily a union bound hand and foot by a constitution imposed on them from outside. So the drafters left the internal rule of the States alone, hoping to induce them ultimately to introduce parliamentary government, and reserving under the constitution extraordinary powers for the Union Parliament to interfere with all State legislation. Unfortunately the astonishing ease with which the States, partly through the spread of dissatisfaction by outside agents, have been persuaded to join the Union, has brought about the premature creation of State legislatures composed of persons unused to such responsibilities, which may be a source of danger to the Federation, and induce the Central Government not only to retain the wide powers given to them in the draft Constitution but to enforce them to the full.

The powers to which Mr. Gadgil takes exception are (i) Nomination of Governor by President; (ii) reservation of State legislation for assent of President; (iii) powers of Union Parliament to legislate for implementing treaties and international agreements; (iv) power of Parliament to legislate on subjects in the exclusive state list where they are declared to have assumed national importance by a two-thirds majority of the Council of State; and (v) power of President to suspend the whole federal structure in a state of emergency or war. Certainly these are powers not found in other Federal constitutions and in fact as Mr. Gadgil rather bitterly observes "All these powers make the Union much less than a federation. Logically their active exercise may lead to the States being reduced to the position of Provinces under the 1919 Act." The 1919 Act did not contemplate an independent Republic or even a Federation within the Empire.

In all this there is danger. Many of the ruling chiefs who may thus be reduced to impotence are enlightened modern rulers, who when the present wave of revolt against all past institutions wears itself out, may regain the affections

of their people and refuse to obey the orders of the Central Authority. The case of Hyderabad shows what will follow, attempted coercion by armed force. But in Hyderabad it was possible to play upon the religious difference between the ruler and his people. The new State confederacies composed of the same martial race as their rulers will tend to be far stronger than Hyderabad.

Among other questions which have to be settled two in particular deserve notice, the franchise and the State language.

As Mr. Gadgil points out, proportional representation is the only means by which specific representation can be guaranteed to the minorities in India. This is not only a question of Hindus and Muslims. The scheduled castes, the Anglo-Indians, the Christians all claim representation, but have little chance of obtaining it in ordinary territorial constituencies. Mr. Gadgil offers the interesting suggestion that the Weimar constitution might be imitated in offering an option to parties to associate the lists of two or three districts in a Union list. By combining the votes of various districts on behalf of any of the dispersed minorities, they might, he thinks, obtain a reasonable representation through persons enjoying their confidence. However if the Congress party retains its influence it appears unlikely that any form of proportional representation will be adopted.

The language question has given rise to great diversity of opinion. Under the Mohammedan emperors a new language, Urdu came into being, a blend of the Persian of the conqueror and the Hindi of the conquered, written in the Persian script. This became a lingua franca of the courts and educated persons in the areas under Moghul sway, but did not supplant the languages spoken by the people. Under British rule English became the second language of all educated persons, and is now the only language in which the inhabitants of Northern India can make themselves understood by those of the South.

For obvious reasons, Urdu has been banished to Pakistan, and English is unpopular with the Anti-British section of the intelligentsia. Consequently two alternatives have been proposed and are still under discussion (i) the promotion of Hindi as a universal tongue and (ii) the redivision of India into linguistic groups.

The first proposal comes from the dominant Hindus of Northern India, whose language based on Sanskrit goes some way towards providing a national tongue. Unfortunately it is not understood by any of the inhabitants of Madras, and although it is akin to the languages of a part of Bombay and has a similar script, it is in many ways different, and is not intelligible even to Mahrathas or Gujratis. Moreover India is ninety per cent. an agricultural country, and the whole revenue system depends on complicated and voluminous land records which have been kept for at least a century in the vernacular of the district to which they belong. In Northern India it may be possible to translate into Hindi the numerous Urdu documents of title, but a change in the rest of India would call for a complete translation.

The second proposal is interesting and has some support from Mr. Gadgil, but there are many practical difficulties in the way. For example, there were in India before the partition 159 languages, and in India as at present constituted there must be at least 100. Consequently a proposal to divide India into provinces in which the main languages, Bengali, Tamil, Telugu, Karnata, Malayalam, Gujrati and Marathi are respectively the mother-tongues would open the way for countless subdivisions. Even those mentioned would involve the breaking up of Hyderabad State, and the provinces of Madras and Bombay into three or four portions each, and destroy the whole well-established system of judicial and executive administration in the Peninsula. Moreover it would still not provide a common language for the Central Legislature or the Supreme Court, and it is not surprising to find that there is a strong feeling in many places for the retention of English.

No doubt the criticisms of Mr. Gadgil and others will be considered carefully

by those who are now endeavouring to put the Federal Constitution into its final shape. As in all Federal Constitutions, the first object of the framers is to provide a proper balance between the Central Power and the Federal units. This is a matter which in the case of India requires more than ordinary care, and must be faced along with the other questions of representation, language, etc., in a broad and liberal spirit, if the Constitution is to have any hope of success.²

UNIFICATION OF PRIVATE LAW

[Contributed by PROFESSOR B. A. WORTLEY]

THE Italian Code has been revised. Professor Meijers is revising the Dutch Code, and there is a committee considering the revision of the French Code. A new Uniform Sales law is being prepared in the U.S.A. There is a growing tendency towards revision and unification in the world today, and for this reason this work,¹ published by the International Institute for the Unification of Private Law, is most timely. The principal articles and documents in the book are both in English and in French, and the work is thus one of major utility for the growing body of students and legislators interested in comparative private law as a living and increasingly important subject.

Part I contains a full account by the President, Massimo Pilotti (pp. 14 to 54) of the twenty years' work conducted by the Institute. Dr. Pilotti is well known for his work at the League of Nations and a former Procurator General of the Italian Republic. Dr. Pilotti gives, in addition to a full list of the Council, committees of experts and staff, a succinct account of the draft uniform laws elaborated by the Institute, together with a full account of the Institute's work as a consultative and referential body.

So far eight draft uniform laws have been produced by the Institute:—

1. On Sales of Corporeal Moveables, with which is associated the names of Hurst and Gutteridge, Rabel, Hamel, Capitant, Fehr and Bagge (for texts see pp. 102-159). Professor Rabel contributes an authoritative article on this draft (pp. 56-65), which is now largely followed by the new Italian Civil Code, and seems to have met with a most favourable reception in Scandinavia (p. 21.) The draft deals only with international sales and does not attempt to touch sales according to national internal law. The draft centres round "the physical act whereby the seller terminates his contractual activity with respect to the goods" (p. 63), i.e. until shipment.

2. A preliminary draft law on international contracts by correspondence (texts pp. 160-167), with which the name of Professor Meijers (who is revising the Dutch Civil Code) is particularly associated. In his article Professor Meijers explains the diverse views governing the nature of acceptance of an offer (p. 73) in different legal systems, and explains that the draft law has allowed an offer to be revocable until acceptance is despatched, thus closely resembling the English system, though offers for which a time is set forth for acceptance cannot be revoked before that time has elapsed under the draft (p. 75). The three schools of thought with regard to the acceptance of contracts by correspondence are well discussed at pp. 79 and 81, and the ingenious solution of the draft is well explained.

3. A draft uniform law respecting the liability of Innkeepers (texts pp. 168-171), submitted to Governments through the League of Nations and now to be revised.

² Since the above article was written, the Constitution has advanced towards completion. It is too early to forecast how far the efforts of the framers to meet their difficulties will be successful. It is now known that they have chosen Hindi as the future official language of the whole of India, but in the meantime English is to be retained for a period of years.

¹ *Unification of Law: A general survey of work for the unification of private law.* (Rome, 1948. Editions Unidroit), 821 pp. including index and tables.

4. A preliminary draft of a Uniform Law on Civil Liability of Motorists and a preliminary draft of uniform provisions on compulsory insurance of motorists (texts pp. 172-185).

5. The preliminary draft of a Uniform Law on Arbitration in respect of international relations of private law (texts pp. 186-211), considered by the International Chamber of Commerce and other interested bodies, is fully described by Professor René David of Paris (pp. 84-99) who shows how little the English, French and Scandinavian Schools really differ in practice, though in theory there are great divergencies (p. 91). Practice in the U.S.A. has shown that it is a positive advantage in dealing with Latin America to be able to stipulate for a decision *ex aequo et bono*.

6. Preliminary draft of a convention on the enforcement abroad of maintenance obligations (text pp. 212-221.)

7. Preliminary draft uniform rules applicable to international loans (texts pp. 223-231).

8. Preliminary drafts of conventions connected with the Berne convention for the protection of literary and artistic works (texts pp. 232-247.)

Part II contains a survey of the achievements of unification. Judge Algot Bagge of Sweden expresses reasoned optimism about the unification of commercial law (pp. 252-269) particularly in relation to the law of sale and "complimentary and dependent contracts" such as agency, transport, companies and insolvency, and claims that the U.N. should assist this work. Professor Hamel of Paris gives an account of the three Geneva Conventions on Negotiable Instruments of 1930 and their background (pp. 270-283). Great Britain has not adopted these conventions. Professor Gutteridge's article (reproduced from his recent work) deals with the position of unification in Great Britain and the Commonwealth (pp. 284-299). Professor H. Yntema shows the progress being made in the U.S.A. towards the unification of state laws through the adoption of model laws and by the restatements (pp. 300-319.) Judge Ekeberg gives a full account of the Scandinavian position and with the latest developments tending towards unity between Sweden, Norway, Denmark, Finland and Iceland (pp. 320-339). Professor Pierre Aeby deals with Professor Huber's codification for Switzerland, subsequently adopted in Turkey (pp. 340-359).

The rest of Part II consists of reprints of International Conventions dealing with the Uniform Law of negotiable instruments, carriage by air and railway, and the protocol on Commercial Arbitration Awards.

Part III gives a very full bibliography on the question of unification as dealt with on an international and internal national basis.

The whole work is a gold mine of information and deserves the careful attention of every serious scholar in the field of private law. At present a few copies are obtainable from Messrs. Sweet and Maxwell, but it is confidently expected that a considerable demand will arise for more information on this important subject.

CZECHOSLOVAK ACT ON PRIVATE INTERNATIONAL LAW

An Act dated March 11, 1948, relative to private international and interlocal law and the legal position of aliens within the sphere of private law.

The National Constituent Assembly has resolved upon the following Act:

CHAPTER 1.

*Private International Law.
Capacity to do legal acts.*

Section 1.

The capacity of a person to do legal acts is governed, in so far as there are in this act no divergent provisions, by the law of the State of which the person in question is a national.

Section 2.

If any person becomes a Czechoslovak citizen he shall not thereby lose such capacity to do legal acts as he has already acquired.

Declaration of death.

Section 3.

A declaration of death is governed by Czechoslovak law as regards a person who at the date when he first became untraceable was a Czechoslovak citizen.

Section 4.

The fact that a person has been declared dead in a foreign country or that in regard to him proceedings have been conducted which are in substantial accordance with that declaration of death as provided by Czechoslovak statutes, may be taken into account only if the person who has been declared dead was at the date when he first became untraceable a national of the State in which the declaration was issued or if such declaration is recognized by the State of which he is a national.

Section 5.

If the untraceable person at the date which is decisive for the purposes of Section 3 was an alien or if it cannot be ascertained that at the said date he was a Czechoslovak citizen, then such person may be declared dead in the Czechoslovak Republic pursuant to Czechoslovak Law with the legal consequences pertaining to legal relationships which are to be adjudged according to the laws in force in the Czechoslovak Republic and with the legal consequences pertaining to property situated in the Czechoslovak Republic. Things for which public registers or records established for the registration of persons having legal titles are kept in the Czechoslovak Republic, as well as claims which may be sued for before the Czechoslovak courts shall be deemed to be property situated in the Czechoslovak Republic.

Section 6.

If the conditions laid down in Section 5 are fulfilled, then upon an application made by the surviving spouse who is a Czechoslovak citizen, the marriage concluded between such spouse and the untraceable person shall be declared dissolved. The same shall apply to the application of the surviving wife if, having been a Czechoslovak citizen until the conclusion of her marriage with the untraceable husband, she remained in the Czechoslovak Republic or returned there.

The form of legal transactions.

Section 7.

Subject to any divergent provisions hereinafter contained, the form of a legal transaction is governed by the law by which the legal transaction itself is governed.

Section 8.

Nevertheless it is sufficient if the form has been duly observed which is prescribed by the law of the places where the declarations of the parties were made, unless by the transaction in question a real right to, or a charge upon, a thing, is created, altered or rescinded.

Choice of law by the parties.

Section 9.

The parties are entitled to submit the legal relationship to a particular law, provided that the relationship has a significant connection with the law so

chosen and provided that such submission does not contravene the compulsory provisions to which the aforesaid relationship is in any way subject in virtue of the provisions contained in this chapter.

Family law.

Conclusion of marriage.

Section 10.

Capacity to marry is governed in regard to each of the betrothed by the law of the State of which that person is a national.

Section 11.

In the case of the surviving wife whose marriage concluded with an untraceable person has been dissolved pursuant to Section 6, second clause, capacity to remarry is governed by Czechoslovak law.

Section 12.

The formalities of the marriage are governed by the law of the place where the marriage is solemnized. Nevertheless it is sufficient if the formalities have been duly observed which are prescribed by the laws of the States of which the betrothed are nationals.

Legal effects of marriage upon the personal relations of the spouses.

Section 13.

The legal effects of marriage upon the personal relations of the spouses including the right to maintenance are governed by the law of the State of which the spouses are nationals.

Section 14.

Should this law be different for the two spouses the aforesaid effects are governed by the last law common to both spouses. Should the spouses never have been subject to a common law the aforesaid effects are governed by Czechoslovak law.

Matrimonial regime.

Section 15.

The statutory matrimonial régime governing the relations between the spouses is prescribed by the law of the State of which the spouses are nationals at the time of the conclusion of the marriage. Should that law be different in respect to the two spouses the statutory matrimonial régime is governed by Czechoslovak law. The laws so determined shall apply even if the nationality of the spouses should change.

Section 16.

The same principles shall apply in respect to the contractual matrimonial régime; provided that the nationality at the time when the contract is made shall be decisive.

Section 17.

If the law of the State where the immoveables of the spouses are situated ordains that the law of the place where the immoveables are situated shall apply, then that law shall apply with regard to such immoveables.

Dissolution of marriage and dissolution of the marital community.

Section 18.

The dissolution of the marriage and the dissolution in any way whatsoever of the marital community are governed by the law of the State of which the spouses are nationals at the time when the action is brought or the application made. Should that law differ in respect of the two spouses such dissolutions

are governed by the last law common to both spouses. Should the spouses never have been subject to a common law such dissolutions are governed by Czechoslovak law.

Section 19.

Should the nationality have changed no circumstance which arose before the change may be adduced as a ground for the dissolution of the marriage or any dissolution whatsoever of the conjugal community unless that circumstance was recognized as such under the law which was applicable prior to the change.

Legitimate Children.

Section 20.

Whether a child born of a married woman is legitimate or not shall be decided according to the law of the State of which the mother's husband was a national at the date of the birth of the child or in the event of his predecease, at the date of his death; should it not be known what nationality he possessed at the dates so fixed, then according to the law of the State of which he was a citizen at the time of his last known residence.

Section 21.

The legal relations between parents and their legitimate children are governed by the law of the State of which all the persons concerned are nationals.

Section 22.

Should the aforesaid law not be the same in respect of all the persons concerned, the last law common to them shall apply; should they never have been subject to a common law the law of the child shall be decisive.

Section 23.

If the law of the State where the immoveables of the child are situated ordains that with regard to the father's rights in respect of such immoveables the law of the place where they are situated shall apply, then this law shall apply.

Section 24.

If a daughter marries, the rights of her parents shall cease to exist in so far as they are repugnant to those vested in her husband according to the law of the State of which the said husband is a national.

Illegitimate Children and the mother of an illegitimate child.

Section 25.

The legal relationship between an illegitimate child and its mother is governed by the law of the State of which both are nationals.

Section 26.

Should the aforesaid law differ in respect of the two of them, that law shall be decisive which is the last law common to them, and should they never have been subject to a common law, then the law of the child shall apply.

Section 27.

With regard to the right of the illegitimate child to maintenance, education, the custody, the law of that State shall apply of which the child is a national at the date of his birth, and with regard to the mother's rights against her paramour the law of that State shall apply of which the mother is a national at the date of the child's birth. Should the mother and her paramour be domiciled in this country at the date of the conception of the child, then Czechoslovak law shall apply.

Section 28.

The granting of a name to the illegitimate child is governed by the law of the child.

Legitimation and Adoption of Children.

Section 29.

The legitimation of an illegitimate child is governed by the law of the State of which at the date of the legitimation the man whose illegitimate child is to be legitimated is a national and, in the event of his pre-decease, by the law of the State of which he was a national at the date of his death; should it not be known what nationality he possessed at the dates so fixed, then by the law of the State of which he was a national at the date of his last known residence.

Section 30.

The adoption of children is governed by the law of the State of which the adopter is a national.

Section 31.

Whether the consent of the child or other persons is required for the legitimation or adoption of a child shall be decided according to the law of the State of which the person to be legitimated or adopted is a national.

Guardianship and similar institutions.

Section 32.

The conditions under which the guardianship begins and ends are governed by the law of the State of which the ward is a national. The guardian's custody in principle concerns the person of the ward and his property wherever it be situated.

Section 33.

The duty of accepting and performing the guardianship is governed by the law of the State of which the guardian is a national.

Section 34.

The legal relationship between the guardian and his ward is governed by the law of the State where the guardianship court or authority has its seat.

Section 35.

The foregoing provisions shall apply by analogy in case of similar institutions of protection such as the curatorship over persons incapable of doing legal acts and ancillary curatorship.

Real Rights.

Section 36.

Real rights to tangible immoveables and moveables as well as the possession of such rights are governed by the law of the place where the things are situated.

Section 37.

The creation and extinction of real rights to tangible moveables are governed by the law of the place where the things were situated on the day when the event occurred upon which the creation or extinction of that right is based.

Section 38.

Provisions concerning entries in the official title registers laid down in the law of the place where the immoveables are situated shall also apply even if the legal ground of the creation, extinction, restriction, or transfer of such rights is to be decided according to foreign law.

Section 39.

Whether and to what extent an owner's action against the possessor can be entertained shall be decided according to the law of the place where the thing concerned was situated on the day when the possession arose.

Succession.

Section 40.

Legal relationship in respect of inheritance is governed by the law of the State of which the deceased was a national at the time of his death.

Section 41.

Capacity to make and revoke a testamentary instrument as well as the conditions of intrinsic validity of such instrument are governed by the law of the State of which the deceased was a national on the day such instrument was made.

Section 42.

Whether a pact relating to a future inheritance is admissible and in how far it can be made or revoked shall be decided according to the laws of the States of which the parties to the pact were nationals on the day such pact was made or revoked. The capacity to make or to revoke a pact relating to a future inheritance, as well as the conditions of intrinsic validity of such pact, are governed by the law of the State of which the deceased was a national on the day it was made or revoked.

Section 43.

The form of making and revoking a disposition *mortis causa* is governed by the law of the State of which the deceased was a national on the day such disposition was made or revoked. Nevertheless it is sufficient if the law of the place where the declaration was made was duly observed.

*Obligations.**Contracts.*

Section 44.

Contracts concerning immoveables shall be governed by the law of the place where such immoveables are situated.

Section 45.

Contracts concluded on an exchange or in a market shall be governed by the law of such place.

Section 46.

Other contracts shall be governed by the law which corresponds to the proper conduct of the legal transaction concerned. Thus as a rule

- (i) contracts of sale and for work and labour made in the course of carrying on a mercantile or trade enterprise are governed by the law of the State where the mercantile or trade enterprise of the seller or undertaker of the work is situated;
- (ii) contracts of insurance including those concerning immoveables and those concluded on an exchange or in a market are governed by the law in force at the insurer's place of business, and in the case of insurance contracts concluded through an agent who is away from the insurer's place of business, by the law in force at the agent's place of business;
- (iii) contracts concluded with physicians, veterinary surgeons, advocates, public notaries, patent agents, officially authorized engineers, and in general with persons publicly authorized to exercise a profession, the object of such contracts being the exercise of such profession, are governed by the law of the place where such persons have their place of business;
- (iv) contracts concerning labour or contracts of apprenticeship are governed by the law of the place where the master's enterprise is situated;
- (v) other contracts are governed by the law of the State where both parties

are domiciled; should they not be domiciled in the same State and should the contract have been made *inter praesentes*, by the law of the place where the contract was concluded; should the contract have been concluded *inter absentes* by the law of the offeree's domicile. In case of a legal transaction made in the course of carrying on an enterprise in so far as the party carrying on the enterprise is concerned, it is not the place of his residence which shall be taken into account but the place where the enterprise is situated.

Unilateral legal transactions.

Section 47.

Unilateral legal transactions shall be governed by the law of the debtor's place of business.

Damages.

Section 48.

Claims for the recovery of damages arising from torts and other occurrences other than breaches of duty arising from legal transactions, are governed by the law of the place where the tort was committed or the occurrence took place.

Acquisitive prescription.

Section 49.

Acquisitive prescription is governed by the law of the State where the thing concerned was situated on the day from which the acquisitive prescription is presumed to have run. Nevertheless the possessor may have recourse to the law of the State where the acquisitive prescription is due to expire, if, reckoning from the moment at which the chattel became situate in that State, all conditions of the acquisitive prescriptions have been fulfilled pursuant to the law of that State.

Dual and uncertain citizenship.

Section 50.

Should any person be a Czechoslovak citizen at the decisive date and should he be simultaneously considered as its own national by some other State, then Czechoslovak citizenship shall prevail.

Section 51.

Should any person be at the decisive date simultaneously a national of more than one foreign State the nationality last acquired shall prevail.

Section 52.

Persons who at the decisive date are nationals of no State or are nationals of more than one foreign State, it being impossible to ascertain which nationality they have most recently acquired, as well as persons whose nationality at that time cannot be ascertained, shall be deemed to be nationals of the State in whose territory they have their residence at the decisive date, and should no such State exist, they shall be deemed to be nationals of the State in whose territory they have their permanent residence at the decisive date. In the absence even of such a State the issue shall be decided according to Czechoslovak law.

Limits imposed on the application of foreign law.

Section 53.

A foreign rule is excluded from application should its application be opposed to *boni mores* or to provisions of Czechoslovak law which, having regard to their character, must be insisted upon without exception.

CHAPTER 2.

Private Interlocal Law.

Section 54.

The provisions of private international law shall apply by analogy to the relations between the law obtaining in Bohemia and Moravia and that obtaining in Slovakia, with the difference that for citizenship shall be substituted domicile in a particular part of the Czechoslovak Republic; should the person concerned never have been domiciled nor resident in the Czechoslovak Republic, that law shall be applied which has a closer connection with the aforesaid person in view of his nationality or other particular circumstances affecting him.

CHAPTER 3.

Citizens and Aliens.

Section 55.

Unless otherwise provided, aliens shall have the same rights and duties within the sphere of private law as Czechoslovak citizens provided that the State of which the aliens are nationals treats the Czechoslovak citizen in respect of the right concerned in the same way as its own nationals.

CHAPTER 4.

Ancillary Provisions.

Section 56.

Separate domicile and interim maintenance of spouses.

Spouses domiciled in the Czechoslovak Republic may be granted a judicial separation and interim maintenance even where the action for dissolution of the marriage or the application for dissolution of the conjugal community is to be brought or made before a foreign court. Such measures shall be valid only in so far as they are not annulled by a competent foreign court.

Appointment and exercise of guardianship, curatorship and ancillary curatorship.

Section 57.

For a Czechoslovak ward a guardian shall be appointed in the Czechoslovak Republic and the guardianship shall also be there exercised. Should, however, a ward who is a Czechoslovak citizen have his domicile or permanent residence abroad, the competent Czechoslovak court may, with the approval of the Court of Appeal, dispense with the appointment of a guardian and with the exercise of the guardianship either entirely or in part if it should appear that a guardianship established abroad is sufficient to protect the rights and interests of the ward. The court may dispense with the care of the Czechoslovak ward's property situated abroad, if it should appear that a particular guardianship has been established abroad which is sufficient to protect the rights and interests of the ward.

Section 58.

1. So far as an alien minor is concerned, all measures necessary shall be taken for the protection of his person and property during such time as the competent authorities of the State of which the minor is a national have made a decision in regard to a guardianship.

2. The Czechoslovak court within the jurisdiction of which an alien minor needing the custody of a guardian happens to be, shall without delay give due notice relating thereto to the authorities of the State of which the minor is a national.

Section 59.

1. Should the authorities of the State of which the ward is a national fail

to establish a guardianship within an appropriate period of time, then the guardianship on behalf of an alien minor permanently residing in the Czechoslovak Republic shall be established and exercised according to Czechoslovak law.

2. Should a guardianship be subsequently established in the State of which the ward is a national, the establishment of the guardianship in the Czechoslovak Republic shall be forthwith annulled.

Section 60.

A curatorship and ancillary curatorship may be established in the Czechoslovak Republic for an alien permanently residing in the Czechoslovak Republic but only where such conditions for his protection are fulfilled as are prescribed not only by the law of the State of which the alien is a national, but also by Czechoslovak law.

Administration of Estates.

Section 61.

The estate of a Czechoslovak citizen shall be administered by the Czechoslovak courts according to Czechoslovak law; if, however, the estate be situated abroad, only in so far as the estate shall be handed over to Czechoslovak courts or in so far as the decisions of the Czechoslovak courts produce legal consequences in matters of succession in the foreign country.

Section 62.

Subject to the following provisions the Czechoslovak court shall restrict itself to the measures necessary to safeguard an alien's estate so far as it is situated in the Czechoslovak Republic.

Section 63.

Should the deceased alien have been ordinarily domiciled in the Czechoslovak Republic, so much of his estate as is situated in the Czechoslovak Republic shall, upon an application made by an heir or a person entitled to the reserved portion, be administered according to Czechoslovak law provided that no opposition has been raised to it by any heir or any person entitled to a reserved portion who derive their titles from the law of the State of which the deceased was a national. The interested persons shall be summoned by a public notice, normally fixing a period of three months, to submit their claims. Such notice shall be published in the Czechoslovak and, if possible, in the newspapers of the foreign state. Such interested persons as are known to the court shall be summoned by service of the notice to make their declarations.

Section 64.

Should the State of which the deceased was a national neither hand over the estates of Czechoslovak citizens to the Czechoslovak courts nor grant legal consequences to their decisions, the estates belonging to the nationals of that State and situated in the Czechoslovak Republic shall be administered according to Czechoslovak law. The same shall apply if it cannot be ascertained in what manner that State proceeds with regard to the estates of Czechoslovak citizens and the decisions of Czechoslovak courts.

Section 65.

Should the State of which the deceased was a national refuse to deal with his estate, then so much of the estate of such alien as is situated in the Czechoslovak Republic or has been handed over by the foreign country shall be administered according to Czechoslovak law.

Section 66.

A declaration of the Ministry of Justice as to the manner in which the foreign State proceeds in the cases enumerated in sections 61, 64 and 65 shall be binding upon the Czechoslovak courts.

Section 67.

In the event of the handing over of the deceased alien's moveables situated in the Czechoslovak Republic, their export not being subject to any prohibition, such delivery can be realised only when the taxes or other duties to be paid from the estate as well as the claims of the heirs, legatees, persons entitled to a reserved portion or other creditors of the estate permanently residing in the Czechoslovak Republic have been secured, such claims having been submitted to the Czechoslovak court after a public citation made for such purpose. Such interested persons as are known to the court shall be summoned by service of the notice to make their declarations.

Section 68.

Should the Czechoslovak court be empowered to hand over the articles comprised in the estate to such heirs, legatees, or persons entitled to a reserved portion as have been declared by the foreign authority to be entitled to benefit, then a third person cannot rise any opposition to the handing over upon the ground of having claims to such articles in the same way as an heir or legatee.

Section 69.

Whether the estate has been administered according to Czechoslovak law or not, the provisions contained in sections 40-43 above shall apply in case of any lawsuit which may arise from the administration of the estate.

Reciprocity.

Section 70.

1. A declaration of the Ministry of Justice issued in agreement with the Ministry of Foreign Affairs and with other competent Ministries concerning the reciprocity afforded by any foreign State shall be binding upon the courts and administrative authorities.

2. Should a foreign State treat Czechoslovak citizens otherwise than its own nationals the Government shall be empowered to determine, by ordinance, the conditions and restrictions to which the nationals of such foreign State shall be subjected in the Czechoslovak Republic in regard to the right in question. So long as no such measures are taken the nationals of that State may enjoy such right in the Czechoslovak Republic only on a permit granted by the Ministry of Justice issued in agreement with the Ministry of Foreign Affairs and other competent Ministries, and upon such conditions as may be laid down in the particular case.

CHAPTER 5.

General, transitory and concluding provisions.

Section 71.

Any provisions to the contrary which may be contained in an international convention published in the Collection of Laws and Ordinances shall be applied instead of the provisions of this Act.

Section 72.

1. On the day when this Act comes into operation all previous provisions concerning matters regulated in the present Act, including the customary law, shall be repealed irrespective of whether this law is based on the decisions of the courts or other sources.

2. In particular, the following provisions are repealed:

- (i) the provisions of sections 4, 33-37, 225, 300 of the Civil Code published on June 1, 1811;
- (ii) the Royal decree dated July 22, 1812. No. 997 Collection of Judicial Laws;
- (iii) the provisions of sections 21-25, 137-143, 183 of the Royal Ordinance

- dated August 9, 1854, No. 208 (Austrian) Code concerning procedure in matters of voluntary jurisdiction;
- (iv) the provision of section 34 of Act No. XVI of 1876 concerning the formalities of testaments, pacts concerning future inheritances and donations *mortis causa*;
 - (v) the provisions of sections 61-65 of Act No. XX of 1877 relative to the regulation of guardianship and curatorship;
 - (vi) the provisions of sections 8, 107-113 of the Act No. XVI of 1894 relative to the procedure in matters of succession;
 - (vii) the provisions of sections 108-111, 113 para. 1 and 2, sections 115, 118-120 of Act No. XXXI of 1894 relative to the law of marriage;
 - (viii) the provisions of section 12 of the Act dated March 28, 1928 No. 56, Collection of Laws and Ordinances concerning the Adoption of Children;
 - (ix) the provision of section 16 of the Decree of the President of the Republic dated October 27, 1945 No. 117, Collection of Laws and Ordinances concerning the declaration of death.

Section 73.

Nothing in this Act shall affect the validity of:

- (i) the provision contained in section 51 of the Civil Code;
- (ii) the Royal Decree dated December 22, 1814, No. 1118 Collection of Judicial Laws;
- (iii) the provision contained in section 112 of Act No. XXXI of 1894 relative to the Law of Marriage and the provision contained in section 113, para. 3 of the same Act as amended by Article I of the Act dated April 14, 1924, Collection of the Laws and Ordinances, including the amendments following from the transfer of the competence of the administrative authorities;
- (iv) the provisions of section 12-15 of the Royal Ordinance dated June 28, 1916 Austrian Code No. 207 concerning interdiction (Statute of Interdiction);
- (v) the provisions of the Act dated October 3, 1946, No. 199, Collection of Laws and Ordinances—relative to the recognition within the sphere of Czechoslovak law of decisions in matrimonial causes given by foreign courts or authorities.

Section 74.

1. If a Czechoslovak citizen is declared dead in a foreign country after the day when this Act comes into operation, then the Czechoslovak court can no longer recognize such foreign decision as a proper basis for either a rescission or an alteration pursuant to section 12, para. 1 of Decree No. 117 of 1945, Collection of the Laws and Ordinances.

2. The provision contained in para. 1 above shall also apply to the rescission or alteration of:

- (i) the proof of death of a Czechoslovak citizen (section 14 of the above-mentioned decree);
 - (ii) a declaration as to the death of a Czechoslovak citizen who participated in the war of 1939-1945 (section 23 of the above-mentioned decree);
 - (iii) a declaration as to the death of a Czechoslovak citizen in so far as such declaration is to serve as a basis for a subsequent petition of the surviving spouse for divorce (section 25 of the above-mentioned decree);
- if such proof or declaration has been made abroad.

Section 75.

This Act shall come into operation on the first day of the second calendar month following its publication. It shall be carried out by the Minister of Justice and Minister for Unification of the Laws in co-operation with the Ministers of the Interior and of Foreign Affairs as well as with other Ministers interested.

RECENT PUBLICATIONS ON THE CONFLICT OF LAWS

[Contributed by P. B. CARTER, Esq.]

Dicey: *The Conflict of Laws*. General Editor J. H. C. Morris. (London: Stevens & Sons, 1949.) Pp. cxxix, 912. £4 10s.

R. H. Graveson: *The Conflict of Laws*. (London: Sweet & Maxwell, 1948.) Pp. xxxii, 394. £1 10s.

Clive M. Schmitthoff: *A Textbook of the English Conflict of Laws*. (2nd Edition.) (London: Pitman & Sons Ltd., 1948.) Pp. xlix, 461. £1 15s.

Ernst Rabel: *The Conflict of Laws, a Comparative Study*. Vol. II. (Univ. of Michigan Press, 1947.) Pp. xli, 705. \$8.00.

R. H. Graveson: *Cases on the Conflict of Laws*. (London: Sweet & Maxwell, 1949.) Pp. xx, 659. £2.

"A DIGEST of the Law of England with reference to the Conflict of Laws," by A. V. Dicey, was first published in 1896. The English conflict of laws was then, by contemporary standards, still in its infancy. The third edition, which was the last for which the author was even partially responsible, appeared as long ago as 1922. Development in the last half century, and even in the last quarter century has been more marked in this branch of English law than in any other. The extent to which this is so is simply verified by studying the table of cases in any modern textbook on the conflict of laws. The proportion of leading cases decided before 1896 is indeed small. It is at first sight, therefore, remarkable that Dicey's treatise should in 1949 still hold its own as a, perhaps the, standard authority on the subject.

A partial explanation is implicit in the observation made by the General Editor of the 6th edition in his Preface, "indeed we were struck by the remarkably few alterations which the Rules required."¹ The truth is that on countless occasions subsequent decision has made certain what for Dicey could only be tentative: what he put forward as conjecture, in retrospect stands out as prophecy.

The residue of the explanation is to be found in the policy adopted by the Editors, and the great skill with which they have carried it out. The insight and foresight of the author notwithstanding, the modern Editors have not infrequently been faced with situations in which they have had to make a choice between "accuracy and loyalty to the author's views."² It is their declared policy to prefer the former to the latter. Any other choice would involve detracting from the practical value of their work. Nor can any general criticisms be made of the way in which the Editors have implemented their policy. The "Comment" especially has been drastically revised in many places. A more ruthless pursuit of their policy would no doubt have caused them to transcend the permissible limits of editorship. Any general criticism must therefore be a very bold one. It would be unseemly to suggest that Mr. Morris and his seven distinguished assistants might have rendered a greater service to the English legal fraternity had they written a completely new treatise instead of bringing up to date an old one. It is, however, regrettable, that the latter project involved amongst other things the retention of a technique of Rule, Comment and Illustration, of which apparently some of the Editors themselves do not approve.

Sometimes the Editors have adopted a practice which, if relatively innocuous, is hardly happy. The wording of a proposition is "modified", and its meaning is thereby virtually reversed. For instance, in Dicey's General Principle No. 1 (his general statement of the "vested rights" doctrine) the word "law" is qualified by the present Editors with the phrase "which is applicable according to the English rules of the conflict of laws."³ The effect of this change is generally to substitute for Dicey's views what is in substance not far removed from the "local law"

¹ Dicey: *Conflict of Laws*. 6th edition. p. xiv.

² Ibid. p. xiv.

³ Ibid. p. 11. See Dicey: 1st edition p. 22 and 5th edition p. 17.

theory. The present reviewer is not presuming to pass judgment on the wisdom or unwisdom of this change in substance. But it is perhaps not to be wondered at that the retention of as much as possible of an old verbal formula to express a meaning very different from that for which the author originally constructed it, has produced an inelegance that is particularly unfortunate in a part of the treatise which deals with such fundamental matters.

The author's acceptance of the doctrine of *Renvoi* is treated in a not dissimilar way. The relevant rule now runs ". . . the law of a given country . . . means when applied to any foreign country, *usually the local or domestic law of that country, sometimes any domestic law* which the courts of that country apply to the decision of the case to which the Rule refers."⁴ The words in italics (not italicized by the editors) are new: in their stead, Dicey wrote ". . . any law, whether it be the local or territorial law of that country or not . . ."⁵

At other times, the Editors have retained the exact wording of the old Dicey Rule, and yet at the same time retained qualifications inserted by former Editors, or inserted qualifications of their own in the Comment and footnotes. So the general definition of the proper law of a contract is retained as being "the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves."⁶ Then in a footnote we are told "The freedom of the parties to select the proper law of the contract does not necessarily imply a right to choose a system of law completely unconnected with the transaction. This is a separate problem discussed below, Sub-Rule 1, post. p. 584."⁷ This Sub-Rule lays down that an expressed intention is "in general" decisive.

It is submitted with respect that this is not a separate problem, but a facet of the same problem. The difficulty which has always beset this problem is in the view of the present reviewer in no small measure due to the general Rule which Dicey laid down and the Editors have retained. Westlake had suggested that the proper law would generally be the law of the country with which the contract had the most real connection.⁸ This criterion does not, and can never, approximate to the intention-criterion put forward by Dicey, however objective the method of determining that intention. The simple case of a contract being clearly most really connected with country X, and the parties' intention (whether expressed or otherwise) being equally clearly that they should submit themselves to the law of country Y, will always reveal the essential dissimilarity of the two criteria. They are as far removed from one another as is Lord Wright's approach to the juridical basis of the doctrine of frustration in the English domestic law of contract from the traditional "implied term theory." Any artificial approximation or attempted reconciliation will heighten the confusion. An essential preliminary to the clarification of this whole problem of the proper law of a contract, is the rejection of at least one of these differing approaches.

Of course logic does not demand that that one should be Dicey's. But the Court of Appeal decision in *Boissevain v. Weil*⁹ (decided since the publication of the new Dicey) suggests that the law is moving into line with the dictates of common sense. The treatment of this whole problem confronts editors with difficulties from which authors might be free.

The place occupied by Dicey's treatise in the English literature of the conflict of laws, and its general nature and internal arrangement are too well known to merit much comment in a review of a new edition. As far as internal arrangement is concerned mention may be made of the vast wealth of references to cases and literature contained in the footnotes. This is particularly useful in what is

⁴ Ibid. pp. 47-8.

⁵ Ibid. 1st edition. p. 75; retained 5th edition p. 60.

⁶ Ibid. 6th edition. p. 579.

⁷ Ibid. p. 580.

⁸ Westlake: *Private International Law*. 7th edition. p. 302.

⁹ [1949] K.B. 482.

primarily a book of reference. Of the general nature of the work it is enough to say that Mr. Morris and his colleagues have brought up to date (January 1, 1949), in a manner which can only be described as masterly when regard is had to all the difficulties inherent in their task, a work which as a comprehensive and very detailed statement of the English conflict of laws stands in a class by itself. To one brought up on Cheshire's "Private International Law", assessment by comparison with that work is tempting. But such comparison would be of little value. Dicey is primarily a book for reference; although it may also be of great use as a textbook to the more advanced student. (For the student who seeks a relatively superficial knowledge of the subject the Rule and Comment technique, especially when the latter sometimes modifies the former, has obvious dangers.) Dr. Cheshire's book can hardly be regarded as presenting a balanced and encyclopædic statement of the law, essential in a book of reference (vide *e.g.* his treatment of validity of marriage, and his advocacy of the law of the intended matrimonial home as governing capacity to marry). On the other hand the originality which is the brilliant quality of Dr. Cheshire's book, would be out of place in Dicey. The two works complement, rather than compete with, each other.

Professor Graveson opens the Preface to his textbook with these words: "This book has been written primarily for students approaching the conflict of laws for the first time." Perhaps there is, at the present time, no more difficult task which a writer on the English conflict of laws could set himself. His subject is, by any comparison with other branches of English law, as yet in the embryonic stage. The consequent uncertainty as to the present state of the law, and the generally greater uncertainty regarding the probable lines of its future development, are unavoidable. They are perhaps increased rather than diminished by the comparative rapidity of contemporary progress in the subject. Uncertainty, and the vast wealth of speculation which uncertainty begets, are factors singularly disturbing to a student approaching any subject "for the first time." Professor Graveson's self-appointed task is therefore, one of some magnitude. Complete success is hardly to be expected even from a writer of his calibre.

In many respects, however, he has achieved substantial success. The outstanding quality of the book is its conciseness. Professor Graveson has compressed into a relatively small space a very great deal of information. On this score he has surpassed all other writers of comprehensive works on the English conflict of laws. But accuracy has not been sacrificed to brevity. Difficulties have not been shunned, nor controversies passed over in silence.

A feature that is particularly useful for the beginner who is not cognisant with the literature on the subject is contained in the suggestions for "Further Reading" at the end of the chapter.

The author tries to achieve his general objective by excluding as far as possible, all speculation, be it of other writers or his own. Here he is, however, inevitably in difficulties. "I have tried," he writes in his Preface, "to keep clear the distinction between law as I think it is and law as it might be; for the factual and the ideal are dangerously susceptible of confusion in this subject."¹⁰ That this attempt must fail—at least partially—is perhaps due to the fact that in many branches of the conflict of laws the distinction is as yet non-existent rather than confused.

It is presumably in order to further his desire to cater for the needs of the beginner that Professor Graveson refrains from criticism of judicial decision to an extent which is hardly characteristic of academic writers; see for example his treatment of *Re Bischoffsheim*¹¹ pp. 126-7.

The major threefold division of the subject matter into "Primary Concepts," "The Validity of Legal Acts," and "The Jurisdiction of English Courts" is

¹⁰ P. v.

¹¹ [1947] 2. All E.R. 830.

perhaps not altogether happy, especially for the student who is coming to the subject for the first time. Nor will the treatment of the difficult subject of Classification as early as Chapter 2 provide much encouragement to such a reader. But subject to these two exceptions, there can be little doubt that in so far as the book fails to be the perfect beginner's guide, the cause of failure is to be found in the nature of the subject matter rather than in its treatment by the author. Regarded either as a general textbook for the use of the more advanced student and the practitioner, or as a stimulant for research and original thought the book is not (and of course does not profess to be) very adequate. Since the publication of the 6th edition of Dicey, there is perhaps no longer room for the former type of work. Since 1935 the standard for works in the latter category has been set so high that the absence of any attempt to replace or rival Dr. Cheshire's "Private International Law" is not surprising.

In their treatment of nullity of marriage, the Editors of the new Dicey have completely rewritten the Rule and Comment (No. 35)¹² in the light of the decision in *De Reneville v. De Reneville*.¹³ Mr. Cross's¹⁴ analysis of the effects of this decision is particularly penetrating; in the opinion of the present reviewer, in this respect it contrasts favourably with that of Professor Graveson. Let us consider the crucial problem: Why was the question of the void or voidable nature of the marriage determined by French law? Professor Graveson quotes Lord Greene, M.R. "the question of whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows. The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion, by the law of France, either because that is the law of the husband's domicile at the date of the marriage (or preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage."¹⁵ Professor Graveson comments "From the analogy of the question of choice of law arising in cases of marriages void according to the English conflict of laws, the Court of Appeal has thus introduced the question of choice of law into cases of marriages regarded by English municipal law, and hitherto by the English conflict of laws, as voidable, through the classification of grounds for annulment in such marriages as matters of essentials of the same nature as capacity to marry."¹⁶ Professor Graveson has elsewhere elaborated his point, the essence of which seems to be "While we may respectfully agree that the causes of annulment do not pertain to the formalities of marriage, it seems no less difficult on rational grounds to classify them as essentials."¹⁷

Mr. Cross however recognizes the limited nature of the question before the Court of Appeal in the *De Reneville* case. He submits that Lord Greene's remarks "cannot be divorced from their context of the particular facts and circumstances of the appeal."¹⁸

It is respectfully suggested that this difference of approach to some extent emanates from Lord Greene's failure to acknowledge the simplicity of the facts before him. The *lex loci celebrationis*, the law of the intended matrimonial home at the date of the marriage, and the law of the putative matrimonial home at the date of petition, were all one and the same, namely French law. That the Court of Appeal are laying down a new principle in resorting to foreign law at all for the determination of the question "is this marriage void or voidable?" is clear. The point in issue is the nature of the Court's reason for resorting to

¹² Dicey: *Conflict of Laws*, 6th edition. p. 244.

¹³ [1948] p. 100.

¹⁴ The specialist editor responsible for this part of the book.

¹⁵ [1948] P. at p. 114.

¹⁶ Graveson: *Conflict of Laws*, pp. 333-4.

¹⁷ *The Conveyancer* (N.S.) Vol. xii. p. 185 (at p. 188).

¹⁸ Dicey: *Conflict of Laws*, 6th edition. p. 261.

French law. It is submitted that Professor Graveson has misinterpreted Lord Greene's statement of his reasons. When he says "This is not a case of forms. It is a case of essential validity," by "this" he means not "any question of void or voidable" but the "grounds of this petition." It is submitted that in the hypothetical case of the petitioner's grounds being matters of formality and not essential validity, the question of void or voidable would have been decided by the *lex loci celebrationis*. On the facts of *De Reneville v. De Reneville* this question of course does not arise; and even if it had done, resort would still have been made to French law, but *qua lex loci celebrationis* and not *qua* the law governing all matters of essential validity.

If this analysis is the correct one, any suggestion that a change in the matrimonial domicile after the marriage and before the presentation of the petition, would be relevant in considering the void or voidable nature of the marriage, can be disregarded. It is true, of course, that it is the petitioner's domicile at the date of the petition, not at the date of the marriage, that is a ground for jurisdiction. But this depends on whether the marriage would be declared void or voidable in the event of the petitioner's success. As the grounds of that petition are concerned with essential validity, it is hardly remarkable that the effects of her success should be governed by the same law as governs the invalidity of those grounds (*i.e.* the validity of the marriage). That law, in Lord Greene's view, is preferably the law of the intended matrimonial home at the date of the marriage. What possible relevance can there be in a subsequent change?

In the opinion of the present reviewer when considering the reference of the question of the void or voidable nature of the marriage to French law, the fact that in the *De Reneville* case France was the putative matrimonial domicile at the time of the presentation of the petition is in this context quite without significance, and the fact that France was the place of celebration would only have had significance if the grounds of the petition had been failure to comply with formal requirements.

One more point, the provisions of the Matrimonial Causes Act 1937 may cause some qualms as to the correctness of this approach. Section 7 of that Act lays down that a marriage will be voidable on the grounds of wilful refusal to consummate. This is unique amongst grounds for nullity in English law in that it relates to a post-matrimonial occurrence. To approach the problem of nullity from the standpoint of the validity of the marriage (at the time of the marriage), as the Court of Appeal does in the *De Reneville* case, is perhaps a little incongruous, if the ground for nullity could not have come into existence at the time of the marriage. But this incongruity stems from a statute which says in effect that a marriage will be treated *ab initio*, notwithstanding the fact that it did take place, and furthermore notwithstanding the fact that the cause of this retroactive voidness did not arise until some time subsequent to the *initium*. That the legislature has seen fit to introduce a double degree of artificiality into the domestic law, is a factor which the Court of Appeal has justifiably omitted to take into account in formulating the rules of the conflict of laws. Mr. Cross has earlier submitted that the retrospective operation of a nullity decree should be abolished as far as voidable marriages are concerned.¹⁹

Some of the ramifications of the *De Reneville* case have been singled out for special mention for two reasons. As far as Professor Graveson's book is concerned, it is the only major point on which the reviewer is unable to agree with what he understands to be the learned author's views. As far as Dicey is concerned, it occurs to the reviewer that it may not be without significance that it is in their treatment of a subject where they have had no alternative but to abandon *in toto* both the form and the substance of Dicey's Rule, that, if degrees of excellence are possible, the Editors' work is perhaps at its best.

¹⁹ Dicey: *Conflict of Laws*. 6th edition. p. 246.

The second edition of Dr. Schmitthoff's "English Conflict of Laws," first published in 1946, appeared last year. The only important changes in the new edition emanate from new decisions and legislation. There has also been a slight abridgment in the treatment of certain minor topics (domicil in oriental countries, and Indian and colonial divorces).

Probably the feature of Dr. Schmitthoff's treatment likely to provoke the most interest and discussion is the author's advocacy of the "vested rights" theory. A review of this sort is not the place for reopening the general controversy on this subject. Two observations on this particular writer's viewpoint are however perhaps pertinent. First, as Professor Lorenzen has done elsewhere,²⁰ exception may be taken to the suggestion that the views of Professor Beale and the Restatement of the Conflict of Laws represent the present American standpoint. Secondly, although of course the fact that Dr. Schmitthoff subscribes to the "vested rights" theory is not itself a legitimate ground for criticism in a review, it does appear to the present reviewer that the nature of the writer's views might be said to excuse, or rather demand, greater elaboration than he has accorded to them.

Dr. Schmitthoff's textbook is, like that of Professor Graveson, remarkable for its conciseness. It constitutes an accurate comprehensive and, having regard to its dimensions, detailed statement of the English Conflicts' . . . rules. Despite the book's undoubted qualities, from which both practitioners and students (except the complete novice) can benefit, the need for such a work is now less marked than it was at the time of its first publication in 1946, when the latest edition of Dicey was 14 years out of date.

In his Foreword to Volume I of Dr. Rabel's "The Conflict of Laws: a comparative study," Professor Yntema, who was one of the author's principal advisers in the compilation of this work, writes of it "It is the first comprehensive comparative legal study (on the conflict of laws) that has been published in English for many moons, certainly the first in any language to take adequate account of the laws of the Americas as well as of Europe. It is, in sum, a pioneer, intensive exploration of a substantial part of the labyrinth of the laws of conflicts from the indicated international point of view, a contribution not only essential for progress in this field but also of general interest as an exemplar of the comparative method in law."²¹ Professor Gutteridge, reviewing the first volume of Dr. Rabel's work, has emphasized its unique character. "This volume represents the first fruits of an enterprise conceived in the boldest spirit which finds no counterpart elsewhere in the literature of the Conflict of Laws."²²

The value of such a work to the practitioner is limited. It does provide him with a source of information on foreign conflicts rules; but in so doing it is fulfilling a very subsidiary function. The author's main purpose is far greater. He seeks to give a survey of the conflicts systems of the civilised world in order to reveal their defects, and with the data he thus acquires to indicate the form which the perfect conflict of laws should take.

His approach is however essentially a practical one. His method is comparative. He is not content with a mere presentation of foreign law; he proceeds to a careful "problem by problem" comparison. But he compares practice rather than theory. Theory is not ignored; it is merely relegated to the position it usually occupies in Common law rather than Continental systems. The Director of the American Law Institute writes of Dr. Rabel's work "Its primary purpose is to make a comparison of the significant legal systems of conflict of laws with reference to the specific problems arising in each topic." The emphasis is, as regards method, on the "specific problems arising in each topic." But the author never loses sight of the overall purpose. This is, as Professor Yntema has pointed out, to break down legal isolationism in the sphere of the conflict

²⁰ 64 L.Q.R. p. 130.

²¹ p. xviii.

²² 63 L.Q.R. p. 112.

of laws; from the American standpoint, it is more specifically to provide an indispensable background for the long overdue restatement of the Restatement; from a more general standpoint, it is in short to render less inappropriate the use of the word "international" in the phrase "Private International Law."

It is to be hoped that Conflicts lawyers on this side of the Atlantic will not be loth to derive full benefit from the invaluable fruits of Dr. Rabel's labours.

The second and present volume of his work covers the law relating to corporations, torts and general considerations in contract. It is hardly necessary to remark that the publication of further volumes will be awaited with eagerness.

Professor Graveson's "Cases on Conflict of Laws" is intended to be a companion volume to his textbook, the arrangement of which it closely follows. As in his textbook, the author caters primarily for students, whom, by omitting less important portions of judgments on the one hand, and head notes in entirety on the other, he preserves from the relatively unprofitable labour of reading the former, and the temptations presented to them by the latter.

The compiler of a case-book is always faced, by virtue of limitations of space, with two possible courses; either he can set out in entirety or near-entirety the judgments delivered in a comparatively few leading cases, or he can cite a series of excerpts from a wider range of cases. Professor Graveson appears to have attempted to follow a course somewhere between these two alternatives. In the view of the present reviewer he has erred, if at all, too close to the latter. When he has omitted judgments or portions of judgments he has noted the fact. It would perhaps have been more helpful if the notification of the omissions of portions of judgments had been made in all cases at the appropriate point in the portions which are reported, instead of taking the form of a general statement to the effect that omissions had been made, at the end of the report.

The compiler of the other standard English case book on the Conflict of Laws, Mr. Morris,²³ has adopted a slightly different course. He includes 57 cases as against Professor Graveson's 99. This difference is largely, although not entirely, accounted for by the difference in space available in the two books. Mr. Morris has endeavoured to cite at least one judgment in full in nearly all his cases. In the reviewer's opinion Professor Graveson could have profitably followed the same course. If a student's method of studying of cases is so slight that he cannot read even one judgment in full, it is perhaps arguable that he might equally well confine his attention to the accounts of cases given in the textbooks.

Professor Graveson's book is dated February, 1949. He has therefore been able to include the several important cases which had not been decided in 1940, when Mr. Morris's book was published.

PENAL REFORM

[Contributed by MADAME TH. BAULIEU, of the Paris Bar]

THE present study of Penal Reform,¹ in the words of the author, "discusses the efforts—humanitarian, educative, administrative—which have been at work to make the administration of criminal justice a rational instrument of crime prevention and social readjustment."

Penal reform and prison reform for the last 150 years have been almost equivalent. They include problems, social as well as legal and psychological. The book records how they were considered in the past, and how the different countries deal with them. The rationale of punishment becomes ultimately a question concerning the condition of men and women under penal and reformative treatment—their hopes and their fate.

In most European countries penal policy showed rational and humanitarian

²³ *Cases on Private International Law*, 1940.

¹ *Penal Reform*. By Max Grünhut. (Oxford University Press (Geoffrey Cumberlege) 1948.) Pp. xv, 486. 30s.

tendencies in the middle of the 17th century at the time when Bacon and Newton explained that experience had its foundation in human reason. Then Voltaire, and Montesquieu followed, until John Howard, a "genius for social inquiry and reform," after inspecting prisons all over Europe, wrote his famous book "State of Prisons." It was the first survey of European prison conditions. His influence was deep if not immediate, though in 1776 the first prison society was founded in Philadelphia, as a result of Howard's conception with a view to restoring criminals to industry and virtue.

Then separate confinement, as compared with the old gaols, marked a step to the way to progress. It prevailed throughout Europe, although the practice was not uniform.

It was subsequently opposed in England, Germany, Spain and France. The idea of individualization of treatment took its place; the peak of the movement was the celebrated Congress of Cincinnati in 1870, bringing about the reformation system, which was a definite contribution to penal reform.

New social and legal aspects of punishment mark the beginning of the 20th century. In England, the Prevention of Crime Act of 1908 introduced Borstal sentences and preventive detention, and the Criminal Justice Act of 1948 marks a further advance. The European criminal legislation reform movement is characterized by "reformation" and "prevention" of crime, showing the way to redistribution of powers between the courts and the administration.

After the historical survey, the author deals with criminology as a science and with methods of penal treatment. He describes the psychological effects of prison life on men and the different attempts of classification of prisoners. Labour in prisons is regarded as the moral foundation of prison discipline, with its twofold objects: training for work and training by work. It passes more and more under public control. Another strong element of prison discipline is personal approach. The principal examples are education and welfare work, which originated as a voluntary activity and has become a matter for co-operation with the State—the work of prison visitors is an instance of this. All these activities benefit from a well established discipline, including co-responsibility of the prisoner to organize inmate participation.

The author then discusses the methods of non-institutional treatment developed by present-day penal policy. Probation is the most remarkable feature of the recent history of criminal law. A comparative survey shows how the two elements, suspension of punishment and personal care and supervision, are combined. It was first experimented with in Juvenile Courts and "the rise of probation in the United States and England encouraged continental countries to introduce conditional sentences." Probation, or conditional condemnation has its counterpart in "parole," or conditional release. We learn its origin, its application throughout the Continent, its technique, which is essentially the same as that of probation, and the need for their co-ordination. But this reform implies psychological treatment. Much is expected, especially from camp life as a school where social qualities can be developed. Bold experiments were made in Russia near Moscow in 1924; there an ex-prisoner may after two or three years' residence in the colony regain full citizenship. The various methods of extramural treatment need co-ordination; still they show the present trend of penal reform, in the treatment of juvenile delinquents particularly.

The various countries do not agree as regards the criminal responsibility of young offenders; but consideration of the offender's "personal condition" is a universal tendency and has led to the rise of Juvenile Courts. The first were established in the United States (Chicago and Denver, 1899). Then England made a start in 1908 and France in 1912. Everywhere the court has power to select the educative measures or punishments adequate to the offender's needs. A special expert social service co-operates with the court. The Scandinavian countries stand alone in establishing municipal "Child Welfare Councils." Cases

of juvenile delinquency are considered from a psychological and sociological point of view, and the treatment has an educative function when children are committed to institutions. The English Borstal system existing since 1902 (it received its statutory recognition in the Prevention of Crime Act, 1908, part I), and well known abroad, relies entirely on trust and co-operation; it organizes also after-care. It has proved successful and has served as an example for the treatment of adult offenders.

As regards habitual criminals the present legislation marks a transition. Discussions in international gatherings suggest that prevention and a social conception of legal punishment are not inconsistent. Legal systems require proof of serious recidivism before preventive detention may be applied and give the Court a certain discretion to decide whether the recidivist should be subjected to long-term segregation. The idea, which aims at security and protection, is complementary to that of rehabilitation, which is the ultimate object of penal policy nowadays.

Amongst women criminality is a more relative notion, and there are differences from country to country regarding both legislation and procedure. The problem has been studied from the same point of view as juveniles; the aim has been to gain the will of the delinquent and build up self-respect. The United States, with their women's reformatories, showed a progressive and comprehensive conception, punishment in the case of women being regarded as implying "committal to a training institution with ample educational and medical facilities." The "cottage system" facilitates individualization, encourages initiative and proves most adequate to women's needs.

The study of the criminological situation of "mentally abnormal persons" shows that the notion of "character abnormality" has caused controversy. In England defect of reason and lack of consciousness are the tests of irresponsibility recognized by the Macnaghten Rules (1843). On the Continent the law is more flexible, considering lack of will-power as a consequence of morbid disturbance. The English conception—now modified by liberal interpretation—is a result of the accusatorial mode of procedure which casts on the defence the burden of proof, whereas the judge on the Continent has a discretionary power to call experts. Residential treatment in colonies or detention in mental institutions, which are current solutions are further proof that criminal law tends to reduce the scope of retributive repression in favour of that of preventive protection.

The author points out throughout his book, whatever aspect he is studying, the human character and tendency of penal reform. Such an exhaustive commentary of the penal problems, with the methods that science and personal approach are able to contribute in order to obtain social readjustment, is a most valuable work.

But the results would not be complete without exchange between various countries, and the author directs attention to the importance of this growing interdependence, which has brought about the rise of international organization. Scientific methods as well as social services are unifying factors. The need for international co-operation was revived by the war. Most of the problems are practically the same everywhere; and when international lawyers explore the possibilities of penal and reformative treatment they feel that penal reform with its ultimate purpose, the readjustment of men and their adaption to the community, has above all to enter and solve their personal conflicts. The record printed in this book shows a universal hope to see human problems, particular or general, solved by human means, excluding the use of force.

Lord du Parcq.—When Lord Du Parcq, two years ago, became Chairman of our Society, we looked forward to a long enjoyment of his guidance and inspiration. But it was not to be, and on April 27 last his sudden and untimely death came as a grievous shock. His gifts were many and varied. His ancestral connection with the Channel Islands and his kinship with that delightful and unconventional American naturalist, Henry David Thoreau, lent originality to his outlook. As Vice-Chairman of the Council of Legal Education, President of the Hardwicke Society and Member of the Permanent Court of Arbitration at The Hague he displayed the versatility of his interests. Admirably efficient at the Bar and on the Bench, ever ready to undertake and discharge any task of public service, rejoicing in a host of friendships, and always full of zest and vigour, he lived a happy life. With sorrow and affection we pay our tribute to his memory, and lament our loss.

MACMILLAN.

Dr. F. P. Walton.—With Dr. Walton's death, another of the great pioneers in Comparative Law has passed away. This is not the place to describe in detail his career, or to attempt a bibliography of his very numerous contributions to the subject; reference may be made to an excellent obituary notice in *The Times* and to future numbers of *Who Was Who*. But the services which he rendered to the Society and to legal scholarship generally, and indeed the central position he held in comparative studies, are too important to be passed by without notice. He had an extraordinary range, for having started as a classical scholar at Oxford, and incidentally as a contributor of admirable light verse to *The Oxford Magazine*, he proceeded to equip himself as a Scots lawyer. Between whiles he visited France and Germany and acquired an excellent knowledge not only of foreign languages, but also of foreign law. It is not, therefore, at all surprising that he should have left the Scottish Bar, after writing a leading text book, to become the Dean of the Faculty of Law at McGill University, Montreal, a post which he later exchanged for that of Director of the Royal School of Law at Cairo. He became a master of French law in its practical as well as in its academic aspects, and one has only to look at his *Egyptian Law of Obligations* to see that he was perfectly able to draw into comparison not only English, but also German law. This is indeed evident in his articles also. Whilst he was exceptionally modern in his outlook and *au fait* with all the contemporary developments in foreign law, he was a firm believer in the importance of Roman Law, to which he wrote a most useful introduction.

He was also personally at the centre of everything. He was a focus around which friends naturally gathered, so that he became the Secretary of the Club in which Oxford lawyers meet regularly to dine, and he was an obvious Editor for this Journal. Walton was a man of great friendliness and hospitality, whose mildness was constantly lit up by flashes of amusement. He was always glad, and even anxious, to receive students from other countries with which he had been connected, especially Egypt, as the writer knows from the experiences of an Egyptian student who called on Walton in his 90th year. No doubt much of Walton's work will pass away, for it is a penalty attaching to pioneering that its results are overthrown by subsequent research, but he laid his foundations securely, and he will above all be known for his capacity to set before the English lawyer in a clear, unpedantic and persuasive form the products of thought in foreign countries. It seems that with all its faults, the "Introduction to French Law," which he wrote with the late Sir Maurice Amos, will remain for long an indispensable starting point for the English student.

F.H.L.

William Draper Lewis.—Although the name of William Draper Lewis, who died recently in Philadelphia in his 83rd year, was less well known in foreign countries than that of some other American legal scholars, he will undoubtedly be recognized by future legal historians as a man who made an outstanding contribution to the development of the Anglo-American common law. He had been a professor of law at the University of Pennsylvania Law School for 28 years, when in 1923 he was appointed the first Director of the American Law Institute. Although the Restatements of the Law, which have since become so famous, had been planned by a number of men, among whom Senator George Wharton Pepper, Mr. Justice Cardozo,

Judge Leonard Hand and Professor Williston played a leading part, it was the energy and administrative skill of Dr. Lewis which brought the Restatements to life. He was responsible in large part for the development of the machinery which played an essential part in this co-operative undertaking. It was he who guided the Institute in its uniformly successful choice of Reporters, to whom was assigned the preparation of the original drafts, and in the equally important task of choosing the committees who were associated with them. As Director of the Institute it was his duty to co-ordinate the work done on the various Restatements and to see that they followed a homogeneous pattern; the unity of the Restatements as a whole is evidence of the success with which he played this guiding rôle. It was due to his insistence on the highest standards of scholarship that these Restatements have been recognized as a major contribution to legal literature.

At one time Dr. Lewis hoped that the American Law Institute might be responsible for a Restatement of International Law, but he was not able to carry out this project. The fact that this task has now been undertaken under the direction of the United Nations is a tribute both to his foresight, and to the example set by the Restatements which had been prepared under his guidance. Although his many administrative duties prevented Dr. Lewis from himself producing any outstanding legal work, it may be said with confidence that few men have made a greater or more original contribution to legal scholarship.

A. L. GOODHART.

Joseph Kohler.—March 9, 1949, marked the passing of a century since the birth of Josef Kohler. Scholars in the field of comparative law will remember him as one of the principal founders of their branch of study. But Kohler's work extended far beyond this; in respect of legal problems it was almost all-embracing, reaching out to promote science and learning in all spheres, excepting only constitutional, administrative and ecclesiastical law. It can truly be said that legal study of all kinds made immense strides through the work of this one man alone. At Berlin University he wrote and lectured on all aspects of civil and commercial law, on criminal law, on civil and criminal procedure, on copyright and patent law, on the law of nations and private international law, on Roman law, on "universal legal history," and on the philosophy of law. As a follower of Hegel's he was much interested in the twin subjects of legal philosophy and legal history which for him, as for Hegel, were identical in their purpose.

Several hundreds of legal articles, monographs, and textbooks bear testimony to Kohler's all-embracing studies, and nearly all of them show a truly remarkable originality of thought. He was not a collector of knowledge; his textbooks were not commonplace books repeating what others had said. He was an independent thinker in almost every line he wrote.

Kohler was not only the most prolific German jurist of his century—in which respect he can only be compared with Bentham—he was one of the "Big Five" of the German jurists of his generation, the others being Otto Gierke, Heinrich Brunner, Otto Lenel, and Ludwig Mitteis. With their deaths a brilliant period of German legal science came to an end.

As to Comparative Law, Kohler, together with two of his colleagues (Bernhoeft and G. Cohn), founded the *Zeitschrift für vergleichende Rechtswissenschaft*. He filled a great part of its many volumes with his own articles. He did not confine himself to studies of the various laws operating in European countries, but extended his interest to include the laws and customs of aborigines and of what he called half-cultured peoples. In this field modern anthropological and ethnological research has to some degree superseded Kohler's results. But it would be unjust if for this reason his great accomplishments were to be undervalued.

Among Kohler's students are numbered thousands of lawyers who came to Berlin University from all corners of the earth—France and Italy, Spain and the Netherlands, Scandinavia, Russia and the Balkans, the two Americas, China and Japan—to hear his lectures, and for these as for many others the memory of Josef Kohler will survive as that of an outstanding promoter of legal science.

M.W.

Professor Lambert.—Dr. F. M. Goadby writes: In the tribute which Professor Gutteridge worthily pays to the memory of the late Professor Lambert one statement occurs to which I feel bound to take exception. The reasons given for Lambert's

retirement from the Directorship of the Khedival Law School, Cairo, are now of small importance, after a period of forty years, but the statement that he was dismissed because of his sympathy with Egyptian nationalism is an ugly and, I believe, quite unjustified slur upon the British authorities then in control in Egypt.

I was on the staff of the Law School under Lambert, and there was no whisper of any such reason for his retirement. Nor, from my personal knowledge of the circumstances of the day, was any such reason likely. National aspirations were no doubt growing up in the minds of the students but, in 1908, they had not become overt as they did after the Protectorate and still more violently after the Armistice. I think that Professor Gutteridge's informant must have been interpreting past events in the light of future happenings. I have no official knowledge of the reason why Lambert resigned, as it was understood by us that he did. The explanation current at the time, and which I judge correct, was that he had a difference of opinion with the Ministry of Education as to the status of the School. Again, my knowledge of the conditions makes this a most satisfying reason. Lambert, whom we all liked, was a choleric man, and the French colony was at the time far from reconciled to the dominant position in Egypt then lately assigned to Great Britain. Knowing the persons concerned I can well understand a conflict resulting in resignation by Lambert. But that he was "dismissed" because of his sympathy with Egyptian nationalism I cannot accept.

80th Anniversary of la Société de Législation Comparée.—An invitation was issued to the Society to send representatives to these celebrations, and Professors R. H. Graveson, F. H. Lawson and B. A. Wortley, Drs. E. J. Cohn and E. G. M. Fletcher, and Mr. C. J. Hamson were able to attend.

The programme was as follows:

Thursday, February 17, at 10 a.m., a formal session in the presence of the President of the Republic, addressed by Professor Niboyet, M. Marc Ancel, Professor de la Morandière, Dean of the Faculty of Law; M. Grunebaun Ballin, late of the Conseil d'Etat; and M. Devèze, of the Belgian Bar. M. Robert Lecourt, Garde des Sceaux, was unable to be present, but his speech was read by a representative. At 2.30 on that day a round-table conference was held on problems connected with the Comparative Study of Civil Law. Professor Niboyet presided, and Professor David made a most interesting report. The meeting was followed by a reception in the Salle des Actes of the Faculty of Law.

On Friday, February 18, at 10 o'clock, a similar conference was held on Public Law under the Presidency of M. Puget, Conseiller d'Etat, and the report was presented by Professor J. J. Chevallier. At its conclusion those taking part in the celebrations were received at the Elysée by the President of the Republic with a charming speech of welcome.

On Saturday, February 19, a round-table conference was held on Penal Law under the Presidency of Professor Donnedieu de Vabres, and a report was presented by M. Marc Ancel. At 4 o'clock a reception was held at the Institut d'Etudes Politiques.

This tightly packed programme, whilst very interesting in itself, did not prevent those taking part from making new and renewing old acquaintances.

Professor Wortley adds:—

"I attended as your representative the celebrations held in Paris last week to mark the 80th Anniversary of the Société de Législation Comparée. The gathering, which was held in the Faculty of Law, was very well attended. In addition to the English delegation there were delegations from North and South America and the principal European countries (including Poland) and Turkey.

"The discussions were largely concerned with methods of teaching comparative public and private law, and the main emphasis seemed to be on the exchange of pupils. There was a considerable body of opinion that it was desirable to give short courses in universities on foreign systems, but thereafter serious work should be done in the country of the law studied, and that academic research should be supplemented by practical contacts with administrators, lawyers and legislators.

"The outstanding development in France is the creation of a new school of higher studies for candidates of the highest grade of the Civil Service, including the Conseil d'Etat. The Director of this school is Professor André Bertrand, who worked in Manchester at the University on his doctorate on Comparative Law before the war. I consider that this experiment, which sets up a course of three

years' duration, including a great deal of practical instruction and apprenticeship, and which recruits candidates from the Civil Service and from the universities on an equal footing, holds very great interest for us.

"The delegations were received by the President of the Republic in his Palace, and met with the very greatest of courtesy and kindness from the French hosts."

International Institute for the Unification of Private Law.—An international Congress is being organized by the Institute to be held in Rome during July, 1950. It will be open to individuals as well as corporate bodies who are in any way interested in the work of unification of private law. It is particularly desired that Universities, National or International Institutions and Academies of Law and also International Organizations should be represented at the Congress. The official notice states that the following points will be dealt with and studied in the course of the Congress:

1. The task of jurists with regard to the elaboration of legislative provisions.
2. The enjoyment and exercise of civil rights, in relation to nationality.
3. The binding force of contracts and modifications of it in modern legislation.
4. The influence of canon law upon the law of contracts.
5. The conception of "Trusts," and its applications in various legal systems.
6. Restrictions of freedom to contract, in the regulation of the relationship between employer and employed.
7. The prospects and limits of the unification of private law.
8. The possibility of completing the international uniform law on bills of exchange and promissory notes approved by the Geneva Convention of June 7, 1930, with particular reference to the English "Bills of Exchange Act" and to the "Negotiable Instruments Law" of the United States of America.
9. The possibility of a uniform international law on carrier's liability, having regard to the different means of transport.
10. The method of unification—Co-ordination of the work of the various international organizations concerned with private law studies.

It is proposed that papers not exceeding an approximate length of 5,000 words should reach the Secretariat of the Congress before April 1, 1950. Details of the arrangements can be obtained upon application to the Secretariat of the Congress, International Institute for the Unification of Private Law, 28, Via Panisperna, Rome.

New Publications.—Our distinguished contemporary, the *Bulletin of the Société de Législation Comparée*, has expanded itself into a new *Revue Internationale de Droit Comparé*. The Bulletin itself is still there, but now forms only one part of a larger whole; and although for the time being the editorial committee is almost entirely French—almost all the famous names one expects to see are there—and the contents bear a marked resemblance to those of the Bulletin we have come to know so well, there is a promise of a Comité Internationale de Patronage, and of a forum in which comparative lawyers of every nation may have their say. The change was heralded not only by the celebrations of the 80th birthday of the Société de Législation Comparée, which are described elsewhere, but also by the enlarged final number of the Bulletin, mainly devoted to a report of the Journées de Droit Franco-Latino-Américaines.

Another forum of more limited scope is provided by the new publication, *Cahiers de Législation et de Bibliographie Juridique de l'Amérique Latine*, published in Paris by Publications France-Amérique. This journal, of which three numbers have been received, is edited by Señor F. de Sola Canizares, and has the support of the Institut de Droit Comparé de l'Université de Paris, the Société de Législation Comparée, of M. Julliot de la Morandière and of M. Marc Ancel.

F.H.L.

Oriental Studies.—An inaugural lecture hardly lends itself to review, but it would be as unwise as it would be ungracious not to draw attention here to the one delivered by Dr. Vesey-Fitzgerald on his appointment as Professor of Oriental Laws in the University of London. In "The Future of Oriental Studies" he suggests with a light touch the immense importance and interest which attach to this vast field of law and looks forward "to the time when students will flock to a

team of well-known expert teachers here, and when the reputation of London in this field shall be as widely known as it is in other fields of University studies." Above all he shows how much eastern and western lawyers have to learn from each other and the value of the study, so seriously interrupted by Sir George Rankin's death, of the historical mission of English law in India. But the test of a good inaugural is in its by-products; and here is a rich fertility which bodes well for the future of Oriental legal studies, at least in one University.

F.H.L.

Indian Historical Records Commission, Proceedings of Meetings. Volumes XXIII and XXIV.—These two volumes are the last and first to be issued under the auspices respectively of the British Empire of India and the Dominion of India; as we are reminded by the emblems on their covers.

Probably no two successive years in the long history of the subcontinent witnessed more momentous changes than 1946-1948, the period here covered. The factitious political union of the two regions which the Mediaeval Arab Geographers and Historians distinguished, under the names Hind and Sind, has ended with the disappearance of British rule. *Per contra*, the Dominion of India has subsequently corrected in large measure the equally artificial administrative disunion within her boundaries, caused by the survival of multitudes of petty States.

The work of the Indian Historical Records Commission during this period must be considered against the background of these changes, actual or impending, with all their repercussions. Sir Shanti Swarup Bhatnagar, in his inaugural address of the 1948 session, felt it necessary to apologise for shortcomings; but we share his confidence for the future. There is ample evidence in these two volumes not only of continuity but of intensification of effort, a promise of further extension of the Commission's activities, and the hope of more generous financial support from the Government. All these are much needed. Of fundamental importance is the posting of trained archivists to all Record rooms where old documents are kept.

Anyone who has worked in the Record rooms of a Provincial Government in India is aware of the wealth of historical material there buried—aware also of the ever present danger that part of these riches may be lost by physical deterioration, which takes so many forms in India. The Proceedings of the Commission show that it is fully alive to this danger, but it is less clear whether the action so far taken to provide against it is commensurate with the urgency. The inspection reports of the Director of Archives, in Appendix E of the 1948 volume, relate to a period of five years, but deal only with two Provincial Governments (in respect only of "Central" records in their custody), three or four important States, and two Residences. Provincial Governments are, of course, the owners of their own records. One can assume that the standard of Archives administration in the three old "Presidency" Governments, Madras, Bombay and Bengal, continues to be well maintained. Indeed it appears (*vide* p. 147 of the 1948 volume) that the Government of Madras resented any suggestion that it could benefit from the advice of the Commission. It may be mentioned in passing that the three Governments referred to possess East India Company records dating back to the 17th Century, equal in historical value to those of the Central Government.

The Commission's Five Year Publication Programme is concerned mainly with 18th Century English records of the Bengal and Central Governments; and with local records written in the more important regional languages. In this latter field, the printing of the Peshwas' Daftar by the Bombay Government in the 1930's was a landmark, and it is to be hoped that equally interesting records of the old indigenous Governments are among those now being transcribed.

For dealing with records in the Provinces, the Commission's policy has been to set up Regional Survey Committees. The functions of these are set forth in Resolution IV of the Proceedings of the Research and Publications Committee, of March 8, 1947. (Pp. 123-134 of the 1948 volume.) The work done by them is briefly reported at pp. 189-191 of this volume, and previously at pp. 142-143 of the 1946 volume.

Conditions during these years were very difficult for research workers, yet it is impossible not to feel disappointment at the results shown. I venture to question the wisdom of clause (v) of the Resolution IV above mentioned. (*Vide* p. 128 of the 1948 volume.)

It is doubtless desirable to examine as many as possible of the old manuscripts

and documents in private custody throughout India; but while research workers are thus devoting their time to unearthing and transcribing isolated deeds, *firman*s, *parwanas* and the like, whole volumes of connected official correspondence a century or two old, relating to public affairs of much wider historical interest, now buried in Provincial, State and District (Government) Record Offices must (I speak from experience) be on the verge of becoming illegible, and may be entirely so before they come to be examined.

The harvest for historical research in India is so vast, and the trained labourers so few in comparison, that carefully planned concentration of effort all over the country seems to me essential at this stage. Individual scholars will, and doubtless should, follow their own line independently, but it is desirable that all not engaged in the five year plan should make their particular hobby subsidiary to taking their share in a duly drawn up regional programme of research.

The papers read at the meetings of 1946 and 1948 illustrate my argument. In view of the limitations on length, such papers cannot be very elaborate, and one expects to find some *pièces d'occasion* of no great weight. There is a rich diversity of subject. Marked variations in the quality of scholarship displayed were also to be expected. But it is more profitable to consider them as a whole against a background of the general condition of historical research work in India.

We find a number which partake of the nature of snapshots illustrative of characteristic scenery, taken by the traveller along an important but hitherto little known road; a road that leads somewhere. It would perhaps be invidious to particularise, but good examples are the excerpts from news letters issued over a substantial period by indigenous Governments, and from the journals or correspondence on public affairs of important Ministers or servants of those Governments.

On the other hand many papers amount to investigation of narrow by-paths which are practically dead ends; or clearings in the jungle which will yield little to further cultivation. It is not a question whether work of this latter kind is worth doing in any circumstances; the point, in my view, is whether India can at this stage afford to let the efforts of her limited number of well qualified research workers be dissipated in this way. The dilettante antiquarian has done work of immense value in England for many centuries past; he has been, and will continue to be, useful in India too. But in India the problem is surely of priorities, of a race against the progress of deterioration of the most vital materials for history.

Let the tracing, the acquisition on loan or otherwise, the arrangements for preservation, of documents now in private hands—work in which some of the Regional Committees have been active—be kept up and extended; but the detailed study, transcription, editing and publication of such documents should not be undertaken at haphazard. The Regional Committees should be in a position to direct the labours of their research writers along the most productive lines. Control and discipline are necessary.

Some change of emphasis in historical study in India after the disappearance of British rule was to be expected, and is welcome. Apart from National patriotism, the intensity of the far older regional patriotism can hardly be realised by anyone who has not lived in India. To regional patriotism is due the great bulk of historical work hitherto done by Indians. But to obtain the best results from this most praiseworthy enthusiasm, it should not be allowed to flow on to unprofitable ground. It can, and should, be canalised by the Indian Historical Records Commission, working through its Regional Committees then alone a due synthesis of India's diverse history may be obtained.

H.T.L.

Western Australian Law Review.—We welcome warmly the appearance of the first number of the Annual Law Review of the University of Western Australia (December, 1948, price 7s. 6d. net), which marks the coming of age of the Law Faculty in that University. No fewer than fourteen articles are included in the number, to say nothing of Notes of Cases and a Review of the Legislation in the State; and although the editorial committee have received valuable contributions from such well-known Australian lawyers outside the State as Professors Paton, Friedmann and Sawyer of Melbourne, Professor Harrison of Queensland, and Professor Baker of Tasmania, the greater part of the work has been done, as was only proper, by members of the Faculty or of the legal profession in Western

Australia. We hope that the review will obtain a wide circulation outside Australia, for it contains much that is of general interest, as may be seen from the following selection: Implied Conditions in Hire; the Judicial Power of the Commonwealth; the Rescue Cases Re-considered; Encroaching Buildings and Possession by Easement; the Administration of New Guinea and International Obligations; Frustration of Contract in the High Court; Voluntary Collective Agreements in Australia and New Zealand; the Teaching of Comparative Law; and Law Reform in Western Australia.

F.H.L.

The English Legal Profession—Dr. E. J. Cohn has published a lecture which he delivered at Cologne last winter on the English legal profession—"Das Reich des Anwalts: Anwaltsberuf und Anwaltsstand in England" *Schriften der Süddeutschen Juristen-Zeitung*: Heft 7. Heidelberg 1949. One could wish that it were translated into English, so well has the author drawn on his experience of both German and English legal practice. Generally these attempts to interpret the legal arrangements of one country to the lawyers of another country are profoundly unsatisfactory, for they tend to take a one-sided view, either unduly laudatory or unduly depreciatory. This is certainly an exception, for it is eminently judicious and balanced.

F.H.L.

The 1948 Revisions to the Restatement of the Law.—The 1948 Supplement to the Restatement of the Law¹ contains the first revisions and additions made to the Restatement of the Law.

The American Law Institute completed the first unit of the Restatement in 1932, when it produced the two volumes of Contracts. The final volumes of text to appear were Volumes IV and V on the subject of the Restatement of Property, approved by the annual meeting in 1944. These were followed by the General Index for the set and by the first permanent volume of the Restatement in the Courts.

The Institute's Restatement was never intended to represent a definite statement of the law such as is the purpose of a code. Common Law rules are modified over the years by court interpretations and application. In most divisions the process is very gradual although occasionally a single decision may reverse the rule established by a substantial line of cases if the court comes to the conclusion that it no longer suits modern conditions.

From the beginning it had been the view of the Institute that as to these basic Common Law Subjects and because of this stability, due largely to their non-political character, the Restatement method is more suitable than that of legislative codification which is subject to several important objections. The first of these is the necessity of legislative enactment of a code in 49 jurisdictions if general uniformity and ascertainability of law is to be attained. Secondly, modification of a code must have like enactment if such national uniformity is to be maintained, a primary consideration in those fields which affect hundreds of millions of transactions every year.

It should be added that codification is more suitable and advantageous under the uniform state law plan in commercial and in some other subjects of a non-political character, when it is desirable to make numerous adjustments and changes to bring them into accord with the present day needs of commercial custom and practice. Such is the situation which has called for the Uniform Commercial Code, now in preparation by the Institute jointly with the Commissioners for Uniform State Laws.

In 1946 it was felt that the Institute ought to look back over what it had said it believed the Common Law in the United States to be in the various subjects included in the Restatement and to see whether the course of subsequent decisions required a modification of the earlier statement of what the law is. It was thought that this was especially true of those fields in which the Supreme Court of the United States has final and authoritative jurisdiction on what the law of the country is or shall be.

¹ *Restatement of the Law, 1948 Supplement*. The American Law Institute Publishers, St. Paul, Minnesota, U.S.A. For a previous discussion in this Journal of the Restatement of the Law, see *The American Law Institute*, by William Draper Lewis, v. 25, Pts. 3 & 4, p. 25, 1943.

Accordingly the Institute's Executive Committee on October 11, 1946, adopted the following resolution:

"**RESOLVED:** We authorize the Director and Assistant Director to make the necessary arrangements as herein directed to produce and submit to the Council a Supplement to the Restatement which shall state the amendments to the text of the sections, comment and illustrations, made desirable by the development of the law since the manuscript of the respective volumes as promulgated by the Institute were completed."

The following persons were appointed as revising reporters for the subjects indicated:

<i>Reporters</i>	<i>Subjects</i>
Warren A. Seavey	Agency
Herbert F. Goodrich	Conflict of Laws
Samuel Williston	Contracts
Albert B. Maris	Judgments
Richard R. Powell	Property (Vols. I to IV, inc.)
Oliver S. Rundell	Property (Vol. V)
Edward S. Thurston	Restitution
John Hanna	Security
Laurence H. Eldredge	Torts (except Div. 9, 10 and pt. of 13)
Harry Shulman	Torts (Division 9)
Stanley V. Kinyon	Torts (Division 10)
Maurice T. Van Hecke	Torts (Division 13, Chapter 48)
Austin W. Scott	Trusts

They were requested to examine all pertinent authorities with a view towards recommending amendments to the Restatement:

(1) Rendered necessary by a change in the law resulting from decisions published subsequent to the preparation of the manuscript of the volume to which the amendments pertain; and

(2) Not changing the law as stated in the Restatement but desirable to clarify its application to matters recently the subject of important litigation.

The reporters examined practically all cases and other authority on matters within the scope of the Restatement of each subject since the preparation of the manuscript of the published text. In five subjects or parts of subjects separately allotted they did not find any amendments to suggest. These are:

AGENCY.

PROPERTY—Volume V.

TORTS—Divisions 9, 10 and 13—Chapter 48 Volumes III and IV.

Some amendments to the texts of the other subjects were suggested. Those which the Council and membership of the Institute deemed necessary were finally adopted at the 1947 annual meeting of the Institute.

That so few amendments were found to be desirable *for the later volumes* is hardly surprising, but that so few changes were needed for volumes completed seven to fifteen years ago, seems to provide ample proof of the basic theory upon which the Restatement was drafted. The largest percentage of changes, as opposed to mere amplifications, came in Conflict of Laws (1935) a subject as to which there was at that time a scarcity of authority upon a good many of the sections:

<i>Subject</i>	<i>Date</i>	<i>Number of sections in Restatement</i>	<i>Number of section changes or amplification</i>
Contracts	1932	609	2
Agency	1933	528	0
Torts 1 and 2	1934	503	32
Conflict of Laws	1935	625	33
Trusts	1935	460	43
Property 1 and 2	1936	240	67
Restitution	1937	215	0
Torts 3	1938	252	0
Torts 4	1939	194	0
Property 3	1941	128	32
Security	1942	211	0
Judgments	1943	130	11
Property 4 and 5	1944	297	20

As relates to basic Common Law subjects to which the scope of the Restatement is limited, it is natural that the process of change should have been extremely slow, but probably most lawyers will be surprised to find how small a percentage of Restatement sections have required either addition or change—some of them only in form and for clarification with little or no change in substance. Of the total, there are some which are of major importance, because they bear upon controversial phases—mainly of new law. However, the very smallness of the percentage of total sections which have called for revision provides added and conclusive testimony to several things.

- (1) The existence of a general body of Common Law, only a small percentage of the rules being controversial.
- (2) The great stability of Common Law rules excepting in the few instances which deal with radically new subject matter.
- (3) The soundness of the Common Law method of developing and adjusting legal principles to new conditions, within the scope of non-political law—traditionally developed chiefly by the courts rather than by legislation. This is not altered by the fact that there are other subjects which have of necessity been developed by legislation or formulated as codes chiefly declaratory of Common Law rules. Yet where the unadulterated Common Law method is applicable, it has the great advantage that adjustment is made quickly and in this country simultaneously for 50 jurisdictions through a few similar decisions in only a few of those jurisdictions, provided they demonstrate a common shift in legal thinking to meet a new and general change in conditions.

The Restatement of the Law, together with this Supplement, may now be described as being "up to date" as of the time the amendments were approved in 1947. It is the hope of the Institute that the users of the Restatement will find in the Supplement a further useful component of the Restatement.

HERBERT F. GOODRICH.

Swedish Law.—This pamphlet¹ is the third in a series intended to describe the Courts and the way of administering the law in various countries. The first two numbers dealt with England and Switzerland respectively, and it is intended to publish others on Russia, the U.S.A., France, Norway, Austria, Czechoslovakia, Turkey, etc. The author, a well-known professor at Upsala who is familiar with English conditions, gives a clear and attractive description of Swedish arrangements, relating them to their historical origins and to the problems of modern life. His account of lay elements in the administration of justice (*nämnd*), as old as, but by no means identical with the jury system, is particularly interesting. Swedish Law is exceptionally worthy of study by English lawyers because the Swedes have, like ourselves, always shown a certain aloofness from the violent oscillations of continental thought, and have tended to view everything in a moderate and empirical way. Hence curious compromise solutions reminiscent of those in England are constantly encountered, for instance the criminal procedure, which is partly accusatory and partly inquisitory.

Canadian Bar Association.—The 1948 Year Book of the Canadian Bar Association, which contains, besides the Minutes of Proceedings of the 30th Annual Meeting of the Association, similar minutes of the Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, is as interesting as its predecessors. From a great mass of material the following may be selected for especial notice. In his speech on August 31 (pp. 114-127), Me. Maurice Ribet, Batonnier of the Paris Bar, discusses two topics, safeguards against arbitrary arrest and against prolonged detention pending trial and, secondly, the practice of breaking down the resistance of a witness by intravenous injections. He mentions the work done by the French Bar in procuring a reform by which a prisoner can insist on being set at liberty fifteen days after his first interrogation except where the offence with which he is charged is punishable with more than two years' imprisonment, and even in those exceptional cases can apply for release by way of appeal from the *juge d'instruction* to a higher tribunal. He also quotes in full a representation made by the Paris Bar to the French Government protesting against the practice of interval injection without a witness's consent by a medical expert acting

¹ *Wie man in Schweden Recht spricht*, by Professor P. O. Ekelöf, Zürich; Scientia-Verlag, 61 pp.

under the authority of the prosecution. From a record of great activity on the part of the Uniform Laws Commissioners one notes in particular approved drafts of Uniform Acts on Frustrated Contracts (similar in intention though not in detail to our own Act of 1943) and on Defamation, and a valuable set of Rules for the Drafting of Legislation. These rules, together with other interesting material, are to be published in pamphlet form for distribution, *inter alia*, to those who apply for copies.

International Penal and Penitentiary Congress.—When the 12th International Penal and Penitentiary Congress meets in The Hague towards the end of the summer 1950, members will look back at a history of 78 years. After the success of the first American National Prison Congress in Cincinnati in 1870, E. C. Wines went to Europe on a diplomatic mission to lay the ground for the first official International Prison Congress, held in London in 1872. For more than two generations the Congress has been an international forum for penal reform, a meeting place of government representatives and independent experts. The transactions and resolutions of the preceding eleven Congresses fill a formidable row of 48 volumes, with few exceptions published only in French. Few libraries, if any, have a complete set of these publications, which contain invaluable material for the history of penal reform and the development of modern criminal law. In 1942, on the 70th anniversary of its foundation, the International Penal and Penitentiary Commission published a short history of this movement.¹ A German translation of the Resolutions of the first ten Congresses was published in 1931.² At the moment when once more experts all over the world are preparing reports for the first reunion after a world war, a new chronicle of the efforts and achievements of the past is most welcome.³ Professor Teeters, well known for his international prison surveys, has spared no pains to give an English translation of all the Resolutions passed by the eleven Congresses, and to bring to life the characteristic features of each gathering, including the social side-lights with the lavish hospitality of bygone days. He added interesting biographical sketches of E. C. Wines, S. J. Barrow, L. Guillaume and other leading figures of the past, thus emphasizing the fraternity of penal reformers beyond space and time. To follow up Questions and Answers from one Congress to another makes the reader feel humble; how many of our problems today are indeed perennial questions? The first Congress in London, 1872, discussed subjects like the unification of various forms of deprivation of liberty, remission of sentences, and conditional release. In 1890, in St. Petersburg, juvenile delinquency came into the forefront, and got a special section allotted at all further Congresses. Gradually European experts were losing faith in the 19th Century prescriptions of Transportation and Solitary Confinement, while the advocates of indeterminate sentences won victories at Washington, 1910, and at the post-war London Congress, 1925. The last Congress, Berlin, 1935, was an anti-climax; under the shadow of totalitarianism no resolution could be passed on the principal issue of a humane and rehabilitative prison regime. Against this background the next Congress will have to work out anew, by international co-operation, progressive methods of crime prevention and penal and corrective treatment. Not only for the criminologist and the penal reformer, but also for everyone interested in the formation of international opinions and their influence on municipal legislation, Professor Teeters has provided an indispensable source of information which will benefit historical and comparative studies.

M.G.

Greek Civil Code.—Professor Zepos desires to correct a statement in his article on the New Greek Civil Code (1946, Vol. 28, pp. 69-70) that "in the Code there are no longer persons (father, grandfather or mother of the bride) who are bound to furnish a *dos*, as was the case in Roman Law." The Civil Code, he points out, "contains special provisions in Art. 1,495 *et seq.*, where such persons (father or mother) are bound to furnish a *dos*." This has been noted by Professor Zepos in a volume on Greek Law which has just been published in Athens, in English, containing the three lectures which he delivered in Cambridge and Oxford in 1946.

¹ L'œuvre de la Commission Internationale Pénale et Pénitentiaire 1872-1942, 10 *Recueil de documents en matière pénale et pénitentiaire* (1942) 1 (also in English and German). For the development prior to the first world war see E. Ruggles-Brise, *Prison Reform at home and abroad* (1925).

² L. Frede and R. Sieverts, *Die Beschlüsse der Internationalen Gefängnis-Kongresse 1872-1930*. Thüringische Gefängnisgesellschaft, Eisenach 1931.)

³ Negley K. Teeters, *Deliberations of the International Penal and Penitentiary Congresses. Questions and Answers*. (Temple University Book Store, Philadelphia, Pa., 1949.) 198 pp.

Creditor Equality in the Americas.—Credit operations involving customers in Latin America are complicated by the fact that, in quite a number of countries in South and Central America the law gives local creditors a right of priority of payment over creditors from abroad in the case of concurrent bankruptcies.¹ This status of the law creates an additional risk which it is good not to overlook when grant of open credit is considered. Creditors from Europe and the United States have been deprived of their equal share in assets in Latin America in a number of cases.

The inequity of the situation and its bad effects on trade relations have long been recognized by leading lawyers in the countries concerned, but nothing has been done about it. The subject was brought up, on the part of the United States, in 1947 at the Fifth Conference of the Inter-American Bar Association. The Sixth Conference, held in Detroit in June 1949, has now passed a resolution: (1) That in bankruptcy, including the case of concurrent bankruptcies, no differentiation should be made between creditors on the basis of nationality, domicile or place of residence; (2) That in bankruptcy no differentiation should be made between unsecured claims on the basis of the place of contract or the place of payment; (3) That a committee be appointed by the Executive Committee to draft a model uniform law which shall resolve the differences in the law as to the treatment of creditors and the realization of assets in bankruptcies affecting creditors domiciled and property situated in different countries—said committee to report at the next Conference.

The resolution was adopted unanimously.

KURT H. NADELMANN.

Colonial Law.—This is a textbook² intended for those students for the *licence en droit* who select "colonial law" as an optional subject. There has been a pronounced need for such a textbook since the war in view not only of the considerable changes in the juridical position of French overseas territories apparently involved in the creation of the "French Union" by the Constitution of 1946, but also of other extensive changes in the law relating to these territories such as the creation of the overseas departments (the *vieilles colonies* of earlier textbooks, i.e. Guadeloupe, Martinique, French Guiana and Réunion) the abolition alike of the *indigénat* (the special régime to which "natives" were subjected in some territories in that the administration was empowered to create, by local *arrêté*, new offences punishable by fines not exceeding 100 fr. or imprisonment not exceeding fifteen days) and of the special penal jurisdictions by which it was enforced, the prohibition of *façon absolue* of forced labour, and the creation of a *Fonds d'Investissement pour le Développement Economique et Social* (fides) of these areas (similar in object to our Colonial Development and Welfare Acts).

All these, and other, changes made the standard textbooks of the inter-war years, such as Girault and Daresté very uncertain guides, even when supplemented by monographs on particular aspects of the subject such as Professor Lampué's magistral study of *L'Union Française d'après la Constitution*, or Professor Pinto's *Aspects de l'évolution gouvernementale en Indochine*. Professor Luchaire's work is therefore very welcome, and as it has appeared almost simultaneously with a successor to the well-known *Précis de législation coloniale* of Rolland and Lampué entitled *Précis de droit des pays d'outre mer*, the needs of the student of this particular field are now very well covered. Professor Luchaire's book contains an introductory section discussing the basis of colonial law, including a short but up-to-date account of international action in this field, and four parts. The first part discusses the constitution of the French Union and contains a very lucid account of the complicated problem of citizenship; the second is devoted to French North Africa; the third to the Overseas Territories and Associated Territories (the former Colonies and Mandated Territories); the fourth to French Indochina. There is also an appendix of the new "Overseas Departments."

It is one of the compensations of the fact that the French approach problems of administration primarily from the point of view of the jurist that what is admittedly a legal textbook finds space for some discussion of administrative and even financial matters. Professor Luchaire is no exception to this rule, and sparing as he is of any undue discussion of these topics, what he does say is up-to-date and to the point. English readers will particularly welcome his treatment of French North Africa, which is fuller than that in Rolland and Lampué and conveniently concentrated in

¹ See note in Vol. 80, *Journal of Comparative Legislation*, Parts III-IV, p. 91.

² *Manuel de Droit d'outre mer*, by F. Luchaire. (Paris Recueil Sirey, 1949.) Pp. 574. 800 francs.

one part of the book. The work as a whole can be confidently recommended as a clear and comprehensive treatment of the subject. It is hoped to discuss some of the recent developments in French Colonial law in a forthcoming article in this Journal.

KENNETH ROBINSON.

NOTICES OF BOOKS.

PRIVATE BILL PROCEDURE

As Principal Clerk of the Committee and Private Bill Office of the House of Commons, Mr. Williams had for many years exceptional facilities, not only for the study of the day-to-day practice of the Department under his charge, but also for researches into the origins and past history of Private Bill Procedure.¹ Of these facilities he availed himself to the full, as the present volume testifies. A second volume containing Historical Notes on the Standing Orders relative to Private Business will complete the work.

No one can pretend that treatises on procedure make light reading, and Mr. Williams in his chosen task has had little scope for the exercise of his hereditary literary gifts. The merits of his work lie in its exhaustive thoroughness and orderly precision. But despite the aridity of his subject he contrives to invest with unexpected interest his account of the development of a branch of Parliamentary activity affecting the daily life of every citizen who enjoys what we now call public utilities, however little he may be aware of it.

The system whereby special statutory powers are conferred by local and personal legislation has a long history behind it and has been evolved in the empirical fashion so typical of our institutions. Mr. Williams traces the course of its development from early times and gives a detailed account of the improvements introduced as the result of a series of investigations of its working by successive committees. While he has confined himself to the procedure of the House of Commons, Private Bill Legislation in the House of Lords has followed very much the same lines, though, as he says, "the attitude and, if I may so put it, the consciousness of each House are unique and different, very largely because the members of the House of Commons are representatives of local electorates, while peers are not,"—a feature which for the purpose in question may be accounted to the advantage rather than to the disadvantage of the House of Lords.

Private Bill Committees occupy an intermediate position between the Legislature and the Judicature. On the one hand the function of these tribunals is legislative inasmuch as they are concerned with the granting of rights and privileges which the ordinary law does not confer and they have therefore the duty before reporting in favour of any measure to satisfy themselves that it is in the public interest; on the other hand they act judicially in so far as they have to decide impartially on the merits between the competing interests of promoters and opponents after hearing evidence and argument. A special code of procedure has accordingly been embodied in Standing Orders designed to secure that the public interest and private rights are alike fully safeguarded. The process by which this has been achieved is the theme of Mr. Williams' treatise.

A section of special interest is devoted to the movement which has from time to time manifested itself in favour of the delegation by Parliament of its powers of Private Bill legislation, at least as regards the holding of inquiries locally instead of at Westminster. In 1899 this movement bore fruit in the Private Legislative Procedure (Scotland) Act of that year under which, subject to certain exceptions and to the ultimate control of Parliament, Scottish measures take the form of Provisional Orders made by the Secretary of State for Scotland, and inquiries are conducted locally before Committees composed of members of both Houses of Parliament or drawn from an extra-parliamentary panel, where a sufficient number of members of Parliament is not available. In the series of Private Legislation (Scotland) Reports, published annually for a number of years after the institution of this new procedure, there is a useful record of the working of what Mr. Williams describes as "a unique but successful measure."

A certain melancholy attaches to this monument of learning, on which the appropriate inscription might well be "Ichabod." For the palmy days of private bill legislation have passed away, partly in consequence of the economic effects upon

¹ *The Historical Development of Private Bill Procedure and Standing Orders in the House of Commons.* By O. Cyprian Williams, C.B., M.C., D.C.L. Vol. I. Pp. viii+339. London: His Majesty's Stationery Office, 1948. 17s. 6d.

enterprise of two world wars and also largely because of administrative changes. The Railway Companies, formerly among the most frequent promoters and opponents in the Committee Rooms, after first being reduced to four, have now been nationalised. Gas and Electricity have likewise been nationalised, and Water may soon follow. Departmental Orders are consequently more and more taking the place of private bills. In the period 1907-1914 the average number of private measures introduced in each session was 125; in the period 1939-1944 the number had dropped to 17. There would appear to have since been a slight recovery as in 1948 fifty local and personal statutes were enacted, of which, significantly nine were Ministry of Health Provisional Order Confirmation Acts.

The value of this survey as a contribution to Parliamentary history and as a compendium of information nowhere else to be obtained is attested by the appearance on its title page of His Majesty's Stationery Office as its publishers.

M.

FUNDAMENTAL CONSTITUTIONAL RIGHTS¹

EVER since the declaration of the Atlantic Charter men's eyes have been turned again to the definition and securing of what, throughout the ages, have been regarded as fundamental rights. The American War of Independence and the French Revolution gave birth to their respective promulgations of these rights, based on contemporary theory of the much older doctrine of natural law. The post-war years of constitutional reconstruction in many lands are years of opportunity, already slipping away too quickly, for ensuring that these elements of the minimum free human life, whether or not embodied in a written document, shall not again be trampled underfoot by militant power, whether political, economic, religious or military. Against this background can be set President Roosevelt's "fundamental freedoms" speeches of January 7, 1941, and January 12, 1944. Against it, too, we may see the attempts of jurists such as Professor Gurvitch² to evolve a bill of social rights intended for the widest acceptance and application. Into such a context comes Mr. Ramaswamy's book, dealing with this problem in its peculiar relation to India.

Although *Fundamental Rights* was published before there existed any serious expectation of a split into India and Pakistan, the author's arguments and conclusions seem equally applicable to the new situation as to the one with which he deals, that of framing a constitutional draft of fundamental rights for an India united on a federal basis. In commending Mr. Ramaswamy's book to those concerned in the drafting of India's constitution Sir Maurice Gwyer, in his Foreword, very properly stresses the essentially practical importance of the problems raised. It is characteristic of the book that its treatment is also practical. It examines fundamental rights, not so much from the viewpoint of how they might work, but from that of how they have worked under the U.S. Constitution.

The author claims to have endeavoured in this book to study the problem of securing human liberties in the constitutional systems of the United States and the United Kingdom. But his choice of the American model for his own country was clearly made before this book was written; for his treatment of the British aspect of the problem is insignificant when contrasted with the care and thoroughness with which he considers the American scene. While he may be excused for devoting more attention to a tangible document such as the U.S. Constitution, expounded by a living, determinate body such as the U.S. Supreme Court, than to the unwritten fundamentals of our own constitution, it is unfortunate that he leaves almost completely out of account the fact that the common law in its English sense has influenced Indian legal and popular thought for many generations; and that it is to understand something of this intangible but very real spirit of English law that so many Indians read law in English universities and the Inns of Court. Only in one passage (pp. 113-4) does the author refer to the freedom of British Indian and Indian State legislatures from the restrictions of a written prohibition against interference with liberty of contract, and he admits that in effect there has been no unreasonable interference with contractual obligations.

The author rightly takes a high view of the U.S. Constitution, and deals at length with the various constitutional safeguards of the individual citizen contained in that document. Its weakness, as he points out, lies in the likelihood of judicial protest by the individual against interference with his constitutionally protected

¹ *Fundamental Rights*. By M. Ramaswamy, Advocate, High Court, Mysore. (Indian Council of World Affairs and Oxford University Press (Indian Branch). 1946.) Pp. xx+252. Price, Rs. 6-8.

² *The Bill of Social Rights*, 1945.

rights; but he hardly seems to answer the underlying problem of securing that any individual shall in fact be free to enjoy and enforce those rights. Mr. Ramaswamy, for example, considers a number of cases of appeals by negroes to the U.S. Supreme Court against discrimination in various ways. He does not consider the personal danger which a negro in certain Southern States would run if he attempted to insist on his rights. The problem of securing the minimum liberty *in fact* to enjoy and if necessary, vindicate constitutionally conferred liberties is one of particular importance in the context of the Indian caste system; and Mr. Ramaswamy has failed to draw the analogy from the tragic irony of the American negro's constitutional equality.

The author, while advocating the guarantee of individual freedom, rejects any guarantee of rights of property or contract. In these matters he "... would allow the largest amount of discretion possible to the legislatures, as the imposition of tangible restraints upon their powers would lead to the stagnation of society by giving an entrenched position to property and privilege" (p. 51). While most lawyers realize the difficulties which the U.S. Supreme Court has had to face in reconciling social and industrial legislation, such as that fixing conditions of labour, with the "freedom of contract" clauses of the Constitution, the implication in the author's views of American society stagnating is belied by many factors, some of which do not appear in books.

Consistently with his rejection of constitutional guarantees of liberty of contract in proprietary matters, the author disapproves of the application of "due process" clauses, such as those contained in the Fifth and Fourteenth Amendments, to legislation affecting property. This whole question is clearly related to that of political opinion; and the author's contentions will be as welcome to some of his readers as they are considered unwise by others. In Mr. Ramaswamy one can sense an element of Benthamite philosophy, as in his passage (p. 110) defining the chief function of a State as being "to secure the greatest happiness of the largest number." But whereas Bentham would achieve that purpose by giving to the individual the maximum of liberty, and particularly liberty of contract (even in such matters as usury and collusive divorce), Mr. Ramaswamy uses the principle as an argument for excluding from his draft constitution any such provision as that of Article I, Section 10, of the U.S. Constitution, directed against State legislation which impairs the obligation of contracts.

The author concludes with a reasoned draft of an Indian constitution, following fairly closely his American model. While his proposals in general constitute an admirable basis for discussion, they contain what, in the views of constitutional lawyers, may be considered as flaws. Into his first Article, securing freedom of speech, for example, he introduces the elastic conception of reasonableness. His second Article on freedom of religion deals only with non-interference by the Federation or a constituent State, leaving the door wide open to the oppression of religious minorities by groups other than Federation and State. One might mention, finally, Article VI of Mr. Ramaswamy's draft, in which he offers a solution of the difficult problem of federal and State citizenship by basing the latter upon domicile (p. 197). One could have wished that the author had defined this term more closely. Does he propose to adopt its American or English meaning, or, as one may justly hope, some more rational meaning better suited to the factual needs of Indian Society? Underlying the whole draft, and indeed any draft based on the U.S. Constitution, is the unspoken question of whether eighteenth century natural law can provide a working basis for a twentieth century constitution. The fact that this natural law Constitution is made to work in modern American society gives no automatic assurance of its validity for a vast and ancient Oriental community. But the learned author is a better judge than his reviewer of the likelihood of a basis of Western philosophy working effectively in an Eastern constitution. The possibility of finding fundamental concepts of liberty and humanity common to the religions and societies of India may be thought worth enquiry in the drawing of plans for the legal foundations of India and Pakistan.

This is a fascinating book, attractively written. The only fault in the author's style is the constant and tiresome reminders in the first person singular of what he has dealt with, is dealing with or proposes to reserve for later discussion. Misprints are few (pp. 36 and 62). *Fundamental Rights* is not of mere transitory value as a brief for an Indian constitution. It is a scholarly contribution to American constitutional law.

R. H. GRAVESON.

DOUBLE TAXATION

SINCE the end of the war conventions for the prevention of double taxation have been made between the United Kingdom and the United States and France, and agreements for the same purpose have been made between the United Kingdom and each of the Dominions and many of the Colonies. The conventions and agreements vary a good deal in their comprehensiveness as well as in their details; and those with the United States and the Dominions have been so drawn as to interlock with the fiscal systems of the two countries concerned, so that it is necessary, in order to construe them, that one should have the necessary amount of knowledge of the tax law of the other country. Article XIII (1) of the convention with the United States is so integrated with the law of the United States that, for example, it abrogates the decision in *Biddle v. Commissioner of Internal Revenue* (1938), 302 U.S. 573, a case in which, it is interesting to note, the Supreme Court of the United States had to construe a portion of a United Kingdom statute.

In this well-arranged book¹ Mr. Koch deals with the United States and French conventions, and with the agreements with Canada, Southern Rhodesia, South Africa and Australia. The scheme of the book is to annotate each Article in these documents, and in that manner to provide a commentary on the law affecting the various Articles and also to supply the very important cross-references.

There is a chapter explaining the legal background of double taxation, also one on the methods of giving double taxation relief in the United Kingdom and the United States. Another very useful feature of the book is the series of appendices, where one can find not only all the official documents of the United Kingdom dealing with double taxation, but also a number of those which have been issued in the United States.

The book can be warmly recommended to those who, in increasing numbers, are for diverse reasons interested in double taxation. The book is attractively printed, and it is to be kept up to date by Supplements.

N. E. MUSTOE.

PROBLEMS IN PROBATE LAW

IN recent years there has been a movement towards probate reform in the United States of America. The Probate Law Division of the American Bar Association accordingly appointed a committee to draft a Model Probate Code, which State legislatures might consult or adopt, wholly or in part. The initial exploratory work for this project was undertaken by members of the research staff of the University of Michigan Law School. The resulting Model Code (of 260 sections), together with some of the preparatory research, is now published as a volume of the Michigan Law Studies.² The Code itself concerns probate in a wide sense—e.g. it covers wills, intestacy and administration. A substantial Appendix, summarizing for each main topic the existing statutory rules of the various States, underlines the present lack of uniformity; the persistence and the many variants of the common-law conception of a widow's dower—this the Code would abolish—is a striking example. The second half of the book comprises three illuminating monographs, by Professor Simes and Mr. Basye, upon problems in probate law ranging from the English origins to the present organization and ideal function of the probate court in America.

S. J. BAILEY.

THE PSYCHOLOGY OF CRIME

"The book,"³ says the blurb on its dust jacket, "is of special interest to judges, magistrates, members of the prison service, probation officers and others concerned with the treatment of offenders." Those classes of persons would undoubtedly agree, but would also vigorously contend that it is of even greater interest and value to psychologists and psychiatrists.

Expert witnesses from these schools of medicine are now constantly before criminal courts of all grades. Quite a number of them have not recognised that there is anyone to think of when sentence comes to be considered save the individual criminal, and so have rejected punishment in favour of treatment as a matter of principle. That such an attitude diminishes society's disapproval of lawbreaking

¹ *The Double Taxation Conventions*. By F. E. Koch, A.L.A.A., A.C.W.A. (London: Stevens & Sons, 1947.) Pp. xxiv, 441. 45s.

² *Problems in Probate Law*. By Lewis M. Simes & Paul E. Basye. (University of Michigan Press, 1946.) Pp. ii, 782.

³ *Society and the Criminal*. Sir Norwood East, M.D., F.R.C.P., London. H.M. Stationery Office. vii & 315 pp. 10s. net.

either does not occur to them or does not seem important. The lawyer and the administrator cannot, or ought not, to think like this; Sir Norwood East plainly says so: "The protection of society from the criminal and of the criminal from society concern both the State and the psychiatrist. The latter is sometimes not free from bias in favour of the criminal, and this seems to be inevitable, since the training of the physician generally leads him to put the interest of his patient before other considerations. But in a criminal case the wider interests of society cannot be impoverished in favour of the offender, and any attempt to do so will eventually injure him as well as the society in which he lives." Those physicians who will not accept this truth from a lawyer may do so from Sir Norwood, who, besides his "due qualifications" has been *inter alia*, one of H.M. Commissioners of Prisons, Inspector of Retreats under the Inebriates Acts and Consultant to the Royal Navy. He has therefore had exceptionally wide experience of the vagaries of human conduct, and essays which, in his own words, are "some of the stepping stones over which (he has) travelled towards a better understanding of crime and criminals" deserve the widest circulation. The Stationery Office has done its best to ensure this by keeping the price remarkably low.

Psychologists (and hereafter this term will be used, inaccurately but conveniently, to include psychiatrists where the context so requires) have tended to put their case so high that Courts have come to feel a reluctant distrust, most aptly expressed in the essay "The State, the Criminal and the Psychiatrist" (at page 10). "It is sometimes proposed that a psychiatric and psychological examination should be carried out on all persons who come before a criminal Court. In my view the scientific approach to criminal problems and the study of the criminal is hindered by extravagant statements of this kind. Is it conceivable that all the offenders referred to previously, who were found guilty of substantial offences and were clear of any further criminal behaviour during the subsequent five years, required a special psychiatric investigation? Can we believe that the large number of motorists who come before the courts of summary jurisdiction should or would submit themselves for examination, or that there are ever likely to be a sufficient number of psychiatrists to carry out the proposal? Progress is best served by recognizing the hard realities which confront us, and by eschewing the fanciful and subversive assertions of doctrinaires." The lawyers may therefore be assured that in reading this book, as indeed they should, they will learn much and never be irritated and put off by woolly nonsense.

Sir Norwood East's outlook is most attractively human. Most of us when young have read in part or in entirety, some work on criminal physiology, and been impressed. As life went on, and one looked at oneself and one's friends after some days and nights of a rough race under sail, or perhaps in the interval of some campaign, these impressions were modified. The more scientific investigators do not usually seem to notice these unflattering moments. But Sir Norwood does: "On my introduction to prison medical work at the opening of the present century, I was impressed by the unattractive appearance of the convicts at Portland prison and attributed it to their criminality. The experience of later years proved this view to be mainly incorrect, and the unattractiveness to be due to four principal causes. One disappeared when the Mental Deficiency Act, 1913, came into operation and withdrew from the prison population an appreciable number of mentally deficient persons. Further improvement was noticeable as soon as prisoners were allowed to grow their hair instead of having it cut close to the scalp with clippers. Betterment increased when their clothes no longer bore the broad arrow stamp and the ungainly uniform of the prisoners was altered so as to approximate to ordinary civilian clothing. Perhaps the greatest change was observed when the harsh penal discipline was replaced by humane understanding, for the facial expression of many prisoners altered when they were no longer treated as criminals to be suppressed, but as men and women whose co-operation was necessary for their reformation." (Physical Factors and Criminal Behaviours, page 75.)

The essay on Crime Senescence and Senility is another and a particularly important example of this gift for understanding. "... Intellectual and emotional contacts are often most fruitful among contemporaries, and understanding between the offender and his judge is most likely to be established when the experiences, temptations and hazards of the one are not too remote from those of the other. They also suggest that the younger magistrates may not be the best fitted in some respects to adjudicate when aged persons commit offences, since few have expert knowledge

of the problems and mental functioning of elderly persons and few have time or inclination to study the matter." (p. 48.) This is profoundly true, and it is fair to say that the rest of this essay has opened quite unexpected vistas for at least one reader who may humbly hope that this estimate and handling of senile offenders may in the future be more apt and intelligent.

Quite a number of these essays were written (or delivered as lectures) before the last war when the Bill which has ultimately become the Criminal Justice Act, 1948, was under consideration with a view to much earlier enactment. They therefore contain many suggestions for the alteration of the criminal law as it then was, to allow proper use to be made of the resources of medicine. All these suggestions save one have, in fact, been adopted, but some practising criminal lawyers may think that the one which has not yet come would have been the most helpful of all. There is nothing more pathetic than to watch from the Bench the continual return, upon one petty charge after another, of the dull, slow-witted, apparently inoffensive person who is neither insane nor mentally deficient, yet who clearly has not and never will have the minimum qualities of concentration and character to enable him to face the fairly complex conditions of ordinary life as it now is. His repeated offences rarely are, in social significance, of any real gravity, and once attempts at training by probation, approved school or training home and Borstal have failed, there is nothing for it but short sentence after short sentence. Nobody, least of all the judge or magistrate, has any belief in the virtues reformatively of such treatment. But there is the deterrent aspect, which cannot be forgotten when persistent recidivism is proved—deterrent that is to say of others who would do likewise if perpetual lenience were shown. Long sentences are seldom in fact admissible for the crimes concerned (which most often arise under the Vagrancy Acts), and even if they are available and occasionally imposed, there is no reason to suppose that prison would succeed where Borstal has failed. What everyone realises to be needed is some kind of special centre to which only persons of that mental calibre would be sent, some kind of, perhaps indeterminate, sentence which would give long enough for whatever treatment and training proved appropriate and a large trained staff capable of applying those methods which the psychologist believes can obviate this type of conduct. This is their field and this their proper material. Sir Norwood suggests something of the sort many times in his book, notably at page 45 in the essay on Responsibility and Culpability. "With reference to convicted offenders, Hubert and myself . . . have recommended the establishment of a special kind of penal institution where research into the problems of normal and abnormal criminal behaviour and the scientific treatment of criminal offenders can be carried out. Here offenders who suffer from abnormal mental conditions but are not certifiable under the Lunacy or Mental Deficiency Acts on the one hand, and those for whom an ordinary prison is inappropriate on the other, would receive the individual attention they require." At present, no doubt, expense and a lack of trained personnel have prevented the implementation of this brilliant suggestion. But whether crime waves rise or fall, this hard core of slow wits will remain a trouble for ever, and sooner or later some such institution must arise.

The topics in these essays cover a fairly wide field, some of it technical, but none incomprehensibly so. There is some repetition because they have been published in print or by word before and were not prepared for this kind of production, but the amount is slight and not at all wearisome. The principal lack that the lawyer will feel is one common to most theses by psychologists; one does not know what Sir Norwood can or has done to right the abnormalities which he so precisely distinguishes and so helpfully describes. This is, possibly, inevitable. When a surgeon operates, the result can be seen. A physician prescribes treatment and the patient's physical symptoms disappear—or do not. But what the psychiatrist does the layman cannot see, and what the results are he cannot tell. One can follow the reasons that prompt the psychologist to say that a patient is a schizoid or a manic depressive, and that these mental states are the causes of his criminal behaviour. What remains a mystery is what can be done—whether anything ever has been effectively done—to cure and, above all, what part this branch of medicine can play to recognise symptoms (which presumably the sufferer does not report because he is not aware of them as he is of physical symptoms) before the commission of those criminal acts which cost the community so much in suffering and in loss. One is left, in fact, with the uneasy feeling that this science has advanced much further in classification than in therapy, that it costs a lot and yields little in return—not upon the individual

plane but as an adjunct to legal administration. If this is an error—or prejudice—it will one day be made clear. Now, because of its existence, it is important to realise that one essential contribution to the proper administration of criminal law can only be made by psychologists. And that is to inform courts to what degree any convict is culpable—culpable, not responsible. Whether an individual is responsible in law for his actions is a matter of law, to be decided by precise rules of law framed for the protection of the community as a whole and apt to ensure that administration is uniform. How far a responsible individual is culpable is not a matter of law but of fact, and largely of medical fact for which evidence is needed. Psychologists and lawyers have too often been at cross purposes with each other because the limits of these two considerations have not been kept clearly in mind. Both have used the term insanity, but in different senses. In law it means a state of mental disease that satisfies the Macnaghten rules; in medicine, many other mental states. In perhaps the most valuable essay of all Sir Norwood East defines the respective rôles and whilst he reminds psychologists that they must leave tests of criminal responsibility to the lawyers, he enjoins the latter to pay proper regard to the various mental conditions that may be regarded from the medical point of view as lessening culpability. (Responsibility and Culpability, p. 33.)

When the next edition is printed, the main requirement will be a new "blurb," to include the doctors.

E.R.G.

LOCAL GOVERNMENT

DR. GLADDEN'S book¹ on public administration is a short introduction to the working of the English Civil Service, with some additional chapters on local government, public corporations and general problems. It is intended primarily for the reader with no previous knowledge of the subject and, within the natural limitations of a simple treatise on so complicated a problem, it gives a clear picture of the relations of the various parts of the structure of government, the working of a central department and the nature of civil servants. It is illustrated with a number of diagrams which will enable some people to understand more easily the relation of the component parts.

Dr. Gladden is himself a civil servant, and has a high regard for the traditions and standards of the service, with which one is bound to agree, but it does not follow that one need agree with the view he expresses in his last chapter of the superiority of administrators to the lesser breeds of philosophers and politicians; nor need one agree with the patronising condescension with which he treats Lord Hewart's "New Despotism," of which he writes "Lord Hewart has had support from many quarters, and the more respectable Sunday papers discover in this a perennial topic for the dog days when there is little else brewing. One cannot help feeling, however, that the learned gentlemen who participate in this brilliant duel could save themselves much trouble if they first made themselves aware of the underlying principles of public administration, particularly in relation to the historic setting."

The chapters on local government are so short that much has inevitably been omitted; there are, however, in these few pages some inaccurate statements, for example, the Poor Law Amendment Act of 1834 did not "create Boards of Guardians with power . . . to combine existing parishes into Unions," nor did the Municipal Corporations Act of 1835 embody "a wider franchise than that introduced by the parliamentary reform of 1832" (p. 98), and it is surprising to meet the statement on p. 105 that "Co-option is only definitely vetoed in the case of the Finance Committee which each borough council is bound to appoint."

These are not the only errors, but they are minor matters; the value of the book lies in its description of the working of the Civil Service, the main danger in its attempt to say too much in too few pages, and in the parts of the book which are not merely descriptive.

The comparative study of the systems of local government in this and other countries is a subject which has received too little attention in the past. One reason no doubt has been the difficulty of obtaining detailed information of foreign systems; before the War Mr. Montagu Harris had done more than any other Englishman to combat this ignorance, both in his capacity as President of the International Union of Local Authorities and by the publication of "Local Government in Many Lands." His new work² is basically a rearrangement of that book, brought up to date in

¹ *An Introduction to Public Administration*, by E. M. Gladden. (London: Staples Press, 1949), p. 155. 12s. 6d.

² *Comparative Local Government*, by G. Montagu Harris. (London: Hutchinson's University Library, 1949), pp. viii, 207. 7s. 6d.

respect of some of the countries he described, though it is startling, when one has read the first 42 pages to find the remark. "It seems necessary to mention here that much of the information given, not only in this chapter but throughout the book, relates to conditions prior to 1939." The world has changed so much in ten years that this short introduction to the study of comparative local government loses thereby much of its value.

With this reservation, the book is undoubtedly useful, it contains a great quantity of information which is otherwise almost inaccessible to the ordinary student, and the lack of other books on this subject enhances the value of Mr. Harris's work. Moreover, it is so written that it is easy to read.

B.K.L.

INCOME TAX.

THIS excellent monograph,¹ which is devoted to an examination of the principles laid down by the Canadian Courts as to the nature of those expenses which may be deducted in the computation of business profits for the purposes of Income Tax, should serve as a useful starting off point for an inquiry into the comparative law of taxation, since the work is based, to a large extent, on a comparison between the English and Canadian statutory and case law applicable to the subject.

The concept of "net" income for taxation purposes is the same in Canada as in this country and cannot be better exemplified than by this quotation from Lord Loreburn's judgment in the classic case of *Usher's Wiltshire Brewery Co. Ltd. v. Bruce* (1915), A.C. 433; 6 Tax Cas. 399,468, "Profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned, the cost of earning it, *subject to the limitations* prescribed by the Act." The most important of these limitations is Rule 3 (a), Rules relating to Cases I. and II., Schedule "D", Income Tax Act 1918 which prohibits the deduction in computing the profits of a business of "any disbursements not being money *wholly and exclusively* laid out for the purposes of the trade." For over forty years this dictum of Lord Davey in *Strong and Co. of Romsey Ltd. v. Woodfield* (1906) A.C. 448, 453 has been accepted by our Courts as determinative of the principles inherent in Rule 3 (a), *supra*: "These words" ("for the purposes of the trade"—A.F.) are used in other rules and appear to me to mean "for the purpose of enabling a person to carry on and earn profits in his trade . . . It is not enough that the disbursement is made 'in the course of, or arises out of, or is connected with the trade. *It must be made 'for the purpose of earning the profits.'*" This dictum was accepted as a rule of law by the majority of the House of Lords in *Smiths Potato Estates Ltd. v. Bolland* (1948) 2 All. E.R. 267 and a claim to deduct the cost of litigating taxation liability with the Crown was rejected on the ground that the expense was not incurred to enable the company to earn profits in its trade—it was incurred after the profits had been earned.

The work under review is devoted to a consideration of the mode in which the Courts in Canada have developed the somewhat similar Canadian taxation provisions; Sec. 6 (1a) of the late Canadian Income War Tax Act (R.S.C. 1927, C.97 as amended) enacted that: "In computing the amount of profits or gains to be assessed, a deduction shall not be allowed in respect of: (a) disbursements or expenses not *'wholly, exclusively or necessarily* laid out or expended for the purpose of earning *'the income . . .'*" This rule is clearly based on the Rule 3 (a) in the British Income Tax code referred to above, but it is much more restrictive because of the addition of the word "necessarily" and the change in the motive of the expenditure from "trade" to "earning the income." The authors endeavour to show how the Canadian Courts, departing from the English case law on the subject, have gone astray with the result that the principles evolved by them as to the admissibility of business expenditure have, it is alleged, become quite divorced from the comparable commercial and legal principles. Following the decision of the Supreme Court of Canada in *Dominion Natural Gas Co. v. Minister of National Revenue* (1940) C.T. C.155, it has been repeatedly held that unless an expense has been directly incurred *in the process of earning income* it cannot be allowed as a deduction in the computation, even though by English standards it could clearly be said to have been laid out "for the purpose of the trade," as a result expenses which reduce a taxpayer's outgoings are not allowed—they must increase his incomings to be admissible, cf.

¹ *Deductions under the Income War Tax Act: a Return to Business Principles.* By F. E. La Brie and J. R. Westlake. (University of Toronto Press, Toronto, Canada, 1948), p. 117 and index. \$2.75.

Montreal Coke and Manufacturing Co. v. Minister of National Revenue (1944) A.C. 126; C.T.C. 94. These principles have become so objectionable to the business community that, in the new Income Tax Act of 1948, set out in Ch. VII of the Work, Sec. 6 (1a) has been repealed and there has been substituted for it a prohibition of "an outlay or expense to the extent that it was not made or incurred in gaining or producing income from property or business;" moreover a section was added providing that "income . . . shall be determined in accordance with generally accepted accounting principles," subject, of course, to any specific statutory prohibitions.

The latest Canadian rule as to the admissibility of business expenses for taxation purposes bears a strong resemblance to the similar rule in the Income Tax code of Australia, see Sec. 51 (1) Commonwealth Income Tax Assessment Act 1935—4b, which reads: "All losses or outgoings to the extent to which "they are incurred in "gaining and producing the assessable income or are necessarily incurred in carrying "on a business . . . shall be allowable deductions . . ." It is also interesting to contrast the comparable American law as to what expenses can be set against the gross receipts of a business for the purposes of income taxation. Sec. 23 (a.1) of the Internal Revenue Code allows a deduction for "all the *ordinary and necessary* expenses paid or incurred in carrying on any trade or business;" it will be seen that the words italicised are both wider and more comprehensive than the corresponding words in the British Income Tax code, namely "Expenses . . . *wholly and exclusively* laid out or expended for the purposes of the trade," cf. *supra*. The Supreme Court of the United States has recently expressed the principle behind these words thus: "Such expenses need not relate directly to the production of income "from the business; it is enough that the expense, if ordinary and necessary, is "directly connected with, or proximately results from, the conduct of the business," *Trust of Bingham v. Commissioner of Internal Revenue* (1945) 325 U.S. 365, 376; applying this principle the Supreme Court allowed the cost of litigating tax liability, a decision in direct contrast to that of the House of Lords in *Smith's Potato Estates Ltd. v. Bolland*, cf. *supra*.

This work should prove valuable not only to the comparative lawyer, but also to all those occupied in tax litigation in this country because of its continual reference to, and learned exposition of, the British law relating to the admissibility of business expenditure for tax purposes.

A. FARNSWORTH.

This work¹ succeeds in its limited object of summarising the existing structure of Egyptian income tax legislation by a translation from the original Arabic text in which it was enacted, and should prove of considerable value to British subjects and company officials resident in that country; the author does not purport to deal with the fiscal problems and controversies involved in income taxation. After the Montreux Convention had abolished the Capitulations in Egypt in 1938, Law No. 14 of 1939 was promulgated by which, for the first time, a tax was levied on incomes from moveable capital, commercial and industrial profits, employments and professions. The system of income taxation in Egypt is taken in great part from the French legislation on the subject. It is interesting to note that, while the actual income from moveable property, commercial and industrial undertakings and salaries, wages and pensions is taxed, in the case of non-commercial professions a *notional* income is charged, calculated by reference to the rental value of the premises used for the profession and the rental value of the private house of the practitioner; moreover no taxation is imposed at all upon a new entrant into such a profession until he has exercised it for five years—the professions in question are those of the lawyer, physician, dentist, midwife, engineer, architect, accountant and any others deemed to be non-commercial by an order of the Minister of Finance. Business profits are estimated in the first place by the taxpayer and the final figure is determined by a Valuation Commission composed of three Government Officials to whom may be added, if the taxpayer so requests, two persons chosen by him from among the commercial community, etc.; this mode of quasi-self-assessment is reminiscent of the "Referees" under Addington's Income Tax Act of 1803 who were nominated by the trader, subject to the approval of the General Commissioners,

¹ *Egyptian Income Tax Legislation*. By Elie C. Farlie, Member of the Bar of the Mixed Courts, Associate Member of the British Chamber of Commerce of Egypt. (Whitehead Morris Egypt, Alexandria. 1946.) Pp. 186 and index pp. 9.

to assess his profits chargeable under Schedule D. It should be added that the Egyptian income tax code does not appear to contain any detailed rules as to the computation of business profits.

A.F.

LEGAL THEORY

THE first edition of Professor Friedmann's book was written in England during the war, the second¹ in Australia in the contemporary version of peace. In many ways the second edition reflects the change in both time and place. Most of what the writer said in his notice² of the first edition applies to the second, with the important qualification that every change that has now been made has constituted an improvement on what was already a work of very great promise. In many ways there has been more than re-editing. The author has omitted several parts of the former edition and introduced completely new material on judicial idealism in modern society and law in modern democracy. His short passage on Bentham (pp. 203-11), also new, is notably good.

Though Professor Friedmann's book does not aspire to completeness, the author may care to consider for future editions the addition of one or two points in giving a more complete picture of matters with which he deals. His treatment of the Revival of Natural Law Theories (Ch. 10) which ends on a note of pessimism, could be strengthened, perhaps by a reference to the Universal Charter of Human Rights. His excellent summary of the theory of Kelsen fails to explain that the *Stufentheorie* depends at all stages of an act of will, a psychological factor which creates a necessary exception to the purity of this theory of law. The book would also gain by a reference to the work of Professor Ross³ both on recent tendencies in realist thought and in Professor Friedmann's chapter (31) on The Principal Antimonies in Legal Theory. Ross, for example, considers very ably the fundamental antimony between reality and validity in law.

The author's reiteration of the importance of political factors in legal theory is more frequent than in his first edition, and he clearly feels deeply on the legal and political development of his country of origin. The writer would respectfully disagree with his statement, however (at p. 429), that "Every ideal of justice must be taken from political theory," at least in its application to the common law tradition of judicial decision. The converse of Professor Friedmann's proposition might be equally true or false. In a stimulating final chapter the author, dealing with the legal values of modern democracy, can find little juristic difference on the subject of personal liberty between written and unwritten constitutions (447.) But one real difference which experience indicates is the paradox that the more firmly individual liberty is entrenched in a written constitution, the less likely it is to survive.

"Legal Theory" in its second edition is even more stimulating in ideas and attractive in style⁴ than its predecessor. The publishers, as always, have produced a book of very high quality.

R. H. GRAVESON.

SOCIOLOGY OF LAW

THIS is an important book⁵ by a distinguished Russian scholar who is thoroughly familiar with modern sociological and jurisprudential literature in English, French, German and Russian. Timasheff displays a splendid command of his sources and his work is the more valuable for the bibliographies at the end of each of the sixteen chapters. The four parts of the book deal, respectively, with Sociology and Law, Ethics, Power, and Law.

The author's thesis is that the legal order does not form the totality of the social order (p. 10), and that the sociology of law deals with law as a social phenomenon (p. 367). One cannot quarrel with this, provided the author's somewhat limited definition of the law is adhered to: "Legal patterns of conduct are supported by centralized power" (p. 15); it is with this sort of legality, usually in a modern setting, with which Timasheff is concerned.

Sociology is nomographic: jurisprudence is ideographic (p. 29), and this book is about sociology. Nevertheless it should be stressed that for the student of law and

¹ *Legal Theory*. By W. Friedmann, Second Edition, 1949. (Stevens & Sons Ltd.) Pp: xiii, 470. 80s.

² XXVII *Journal Comp. Leg.* 117 ff.

³ *Towards a Realistic Jurisprudence*, Copenhagen, 1946.

⁴ But the word "trustification" at p. 443 is a little hard to digest.

⁵ *An Introduction to the Sociology of Law*, by N. S. Timasheff. Harvard University Committee on Research in the Social Sciences, 1939. \$4, xiv & 418, including tables, Bibliography and indexes.

jurisprudence, as Lauterpacht has so well shown, there is, ideally, a legal solution for every sort of conflict; the distinction between legal and political disputes, in so far as it still exists, in international law for example, is founded on a purely conventional and not on a rational basis. Even codified systems are deemed to be capable of providing solutions for any kind of dispute. A French judge is for example forbidden to refuse a decision on the ground that there is no law in point: uncodified legal systems postulate the existence of legal rules for all cases, even if in fact the judges openly fall back on ethical conceptions in the absence of case law or statute law as they do in English law, or on "the general principles of Law," as does the Hague court.

State domination without ethics, in which the state commands, but is not itself bound by any rule, is not law according to Timasheff (see pp. 214/5): patterns of conduct are not supported by centralized power when that power holds itself free to disregard them. Lenin's view that a decree was merely propaganda not binding on the State itself (p. 214) did not give rise to law. According to the principle of revolutionary expediency, in Russia from 1917-1934, "every local authority had to act in conformity with the general orders issued by the central authority, but only in so far as this would not run counter to the interest of the proletarian revolution . . . revolutionary expediency was to prevail over legality" (pp. 214/5). This state of affairs is dangerously close to anarchy (a subject very well analysed in the last chapter of this book). "People acting in crowds fall in their actions to a lower level of cultural development. One of the clearest evidences (sic) of this 'low' social level is the substitution for the culturally acquired mechanism of social retribution of its predecessors, of the instinct of revenge . . . suddenly liberated from all the restrictions of modern ethics, people, killed, wounded and robbed actual or imaginary enemies without any regard for the rule of proportion between the individual deed and the collective response, or for the principle of personal responsibility" (p. 115). Mob rule, lynch law, and the rest, are dangerous experiments, and when used as a means of subverting a social order may well result in prolonged anarchy. Fortunately, habits and social organisms have a way of surviving (p. 163), and "there are a few ethical rules which seem to be common to every society" (p. 68). The danger is nowadays that large scale atomic war, or atomic civil wars, may destroy society, and with it the need for sociologists or for the law itself! The Nazi experiment showed how bad group convictions can be instilled into the immature (p. 75): hence the need for ethical teaching of the highest order among the young. Objective ethical rules, as opposed to the anarchistic subjectivism of irresponsible leadership, "are not only rules demanding in advance a certain conduct, but are also rules helping us to evaluate behaviour which has already taken place" (p. 79). Such rules indeed are one of the continuous features of law and order.

We have progressed a great deal since John Austin's day, as this work shows (thanks to sociologists and students of sociological jurisprudence), in our appreciation of the nature of the command (pp. 178 and 182) and the custom (pp. 147/8). The sociologist can indeed provide valuable data for the lawyer and the legislator. The legal order is something that demands analysis, and people of good will should fight not against it "but rather for the transformation of this order in a manner calculated to secure the realization of the noblest human ideals in political, economic and moral affairs, and in general culture" (p. 378). This had indeed a prophetic ring in 1939 when this book first came out. It is just as apt and as sound today.

B. A. WORTLEY.

THE INNER TEMPLE

THE late Lord Justice MacKinnon had contributed over a long period of years miscellaneous notes upon matters connected with the Inns of Court especially his own Inn, the Inner Temple. Many of them had already appeared in print and this little volume¹ brings them altogether, usefully and entertainingly in a form to facilitate their permanent preservation. In particular there is a new and enlarged revision of the annotated edition of Charles Lamb's famous essay on the Old Benchers of the Inner Temple, which was originally published in 1927. It contains much quaint information and identification of personalities. Another item in the volume which is of permanent historical value is the account of the destruction done to the Inn during the years of war, from 1939 to 1945, which is accompanied by a series of illustrations showing buildings before and after the raids. Among other subjects

¹ MacKinnon, Sir Frank Douglas. *Inner Temple Papers*. (London: Stevens & Sons, 1948), pp. vii, 236. 21s.

illuminated by the learned author's research are the use of the horn before dinner, the "Temple Family," Sir Christopher Hatton, the Readers of the Inn and Sir Edward Coke. The contents are so varied and include so many odd pieces of research that the publishers can only be regarded as having failed in their duty to the memory of a true lover of his Inn and profession by not supplying an index of this volume, which is apparently posthumous, though there is no statement to that effect.

NATIONAL FINANCE

PROFESSOR PASTORI's work¹ contains a clear and pleasantly written statement of the control of public accounts in Uruguay. The author rightly points out that the control of public accounts is one of the pillars on which true democracy rests. He is anxious to strengthen every form of it—that by Parliament as well as that by the Tribunal of Accounts, and last, not least, that by means of the ordinary and civil penal law. Comparative material is used in order to strengthen the author's arguments for a reform of Uruguayan legal rules and political conditions. He complains that in many countries parliaments have shown a deplorable apathy, and thereby allowed the administration to assume powers which by right should not be theirs. He stresses that this country and the U.S.A. are honourable exceptions in this respect. The fact that the author has been able to publish a second edition of his work seems to show that his plea has not failed to find a responsive audience in his country.

E. J. COHN.

PRIVATE INTERNATIONAL LAW

THE fact that the large-scale emigration of scholars from a number of European countries has greatly enriched the literature of the law of conflicts of laws has not infrequently been commented upon. Here is another instance of such enrichment—one that is perhaps particularly significant because it is the work of a German refugee, who has found a new home in Spain, a country from which other scholars have had to go forth in search of exile abroad. Thus, while Jimenez de Asua and Galindez—to mention jurists only—have had to leave Spain and publish their new works in South and Central America, Dr. Goldschmidt writes from Madrid and places his wide knowledge of Central European literature at the service of the Spanish legal world.

The reference to "filosofia" in the title of this work² may imbue English readers with a prejudice against the author's intentions or his method of treatment. It may, therefore, be pointed out that there is nothing of "philosophy" in this work or, at least, so little that it cannot possibly disturb those who approach law books with a severely practical mind. It is true, the author has thought fit to start with an introduction on the legal philosophical basis of his work, but the three pages on which these "bases" are explained in a somewhat apodictic way, will not do anybody any harm, though one cannot well see what good they can do to anybody, except, perhaps, to the author himself, who may feel that he has pegged his work to some more general conceptions. The rest of the work is a straightforward law book, though, fortunately, not a commonplace one.

The author has tried to write a comparative system of private international law on the basis of the Spanish law of conflict of laws. In other words, his intentions are not too dissimilar from those which Kuhn's *Comparative Commentaries on the Law of Conflicts and Laws* and Rabel's masterful work pursued on the basis of the American legal system. Dr. Goldschmidt, of course, is a Continental writer, writing in a Continental country. It is not surprising, therefore, that he allots much more space to a description and a criticism of theoretical and academic writings and theories. But he has well balanced this doctrinal aspect of his work by many examples taken from decisions of the Courts of all the more important countries and, above all, by very rich references to the decisions of the Spanish Courts. His writing, as well as the arrangement of the material, is throughout clear and attractive. Criticisms of other writers' views are moderate and well-reasoned. The statements of opponents' views are fair and intelligible.

¹ Aurelio Pastori (Professor in the Faculty of Economic Sciences and Administration at Montevideo), *El Control de la Ejecucion del Presupuesto en el Uruguay*. 2nd Edition. Montevideo. Impresora Uruguaya S.A. Cerrito esq. Juncal. 1948. 220 pp.

² *Sistemay Filosofia del Derecho Internacional Privado*. Con especial consideracion del Derecho Internacional Privado Espanol. Tomo I. By Werner Goldschmidt, Doctor en Derecho Aleman—Abogado Espanol (Bosch, Casa Editorial/Urgel 61 bis, Barcelona, 1948), pp. 311.

The author has digested a very large amount of material. One cannot without admiration note that his references and his research include the laws of countries like Greece and Thailand, while, on the other hand, he does not fail to inform his readers in which of the States the U.S. Marriage Evasion Act applies and who the "spiritus rector" of the Montivideo Treaties was. Necessarily, the author has not aspired completeness. Nor can one expect him to treat this vast material with the same depth and accuracy as a writer who confines himself to his own national law. Thus English and American lawyers may here and there find that principles of their laws are somewhat more broadly stated than they are actually intended. The author's treatment of the English law of *renvoi* is in point. But such complaints can hardly detract from the value of the work of a scope as comprehensive as the present. We cannot see as distinctly over a long distance as we can in our immediate neighbourhood. But it is hardly possible to dispute the value—and in fact the necessity—of taking from time to time a long-distance view.

The author's Central European background has necessarily strongly influenced his manner of treatment of his material. From the point of view of many readers this is an undoubted advantage of his work. Lawyers outside Spain will presumably find that this work has greatly facilitated access to the sources of Spanish law for them. English lawyers will presumably read with particular interest the author's treatment of the Spanish law relating to *renvoi*, which has recently been discussed in so startling a manner in the Duke of Wellington's case (1947) Ch. 506. It fully bears out the statement made by the expert witnesses that Spanish law has not yet taken a final attitude to the matter. The author discusses the cases which were discussed here and he, too, holds that they are inconclusive. It is, however, interesting to note that in his view the Spanish Supreme Court shows a tendency to favour the *renvoi*. It is to be hoped that the learned author will find an opportunity of discussing the Wellington case in the second volume of his work.

The present first volume of Dr. Goldschmidt's work comprises the general part of the law relating to the choice-of-law problem. The second volume is to deal with individual choice-of-law rules. Everybody interested in comparative law or the law of conflict of laws will look forward with interest to the continuation of this valuable work.

E. J. COHN.

According to Swiss Private International Law, Swiss Courts have jurisdiction to pronounce decrees of divorce on the basis of Swiss law, where the parties are aliens, provided that the *lex patriae* of the parties allows a divorce in similar circumstances and recognises the jurisdiction of the Swiss Courts. Although not directly concerned with the administration of foreign divorce legislation, Swiss practice is therefore strongly interested in the material and jurisdictional provisions of foreign divorce laws. The emergency of authoritarian regimes, the war and its aftermath brought considerable changes. The author, who has recently published an interesting monograph on the law governing the conclusion and essential validity of contracts, has devoted his inaugural lecture¹ at St. Gall to a survey of changes in the divorce laws of the countries of Europe in the last decade. In view of its practical purpose, the lecture aims primarily at providing a concise re-statement rather than an analytical or critical examination. Nevertheless, certain characteristics emerge. The authoritarian States in the East and West are restricting divorces; Central European countries are relaxing their provisions. In those countries of Eastern Europe where divorce was formerly governed by ecclesiastical law, divorce laws on the lines of Central European legislation have been introduced. The institution of judicial separation is steadily losing ground. A useful appendix reproducing the texts of recent divorce laws supplements the lecture.

K. LIPSTEIN.

INTERNATIONAL PRIVATE LAW

This is the first part² of a very able and painstaking analysis of the conflict of laws problems involved in the expulsion of millions of persons from their former homes in Central and Eastern Europe. The English speaking world has for years been

¹ Das europäische Ehescheidungs- und Ehetrennungs-Recht in seiner neuesten Entwicklung. By Dr. jur. Rudolph Moser. (Zürich, Schultheis & Co. 1948.) IV, and 65 pp.

² Der Neubürger im internationalen Privatrecht. Erster Teil. Allgemeine Grundlagen. By Dr. Murad Ferid. Berlin (de Gruyter) and Tübingen (J. C. B. Mohr.) 1949. 113 p.

confronted with the legal difficulties created by enforced mass emigrations from Germany. In practice, many of these difficulties were solved by the application of the domicil test to the status of refugees, and by a judicious adaptation of that test to the distressing needs of our century. The Convention of July 4, 1936, concerning the States of Refugees from Germany, was, *inter alia*, designed to give effect to this criterion. In the case of those persons of German origin or language who have been expelled from Poland, Czechoslovakia, Hungary, Yugoslavia, etc., and who have sought refuge in Germany, the legal situation is enormously complicated by the insistence of German law on the application of the nationality test in all matters of status and capacity, marriage, succession, etc. The overwhelming majority of the refugees or "new citizens" (as they are called in modern German parlance) were deprived of the nationality of their former countries either before or shortly after their enforced emigration. Nevertheless, the law of their former nationality continues to govern certain aspects of legal relationships which originated before the change of nationality. The validity of a marriage concluded under the old law must be judged in accordance with the law of the old nationality despite its loss by the spouses, and the effect of marriage upon the property relation between the spouses is, by German private international law, "immutably" governed by the law of the husband's nationality at the time of the marriage. These and similar situations compel the German courts to disentangle problems of unrivalled legal and factual complexity. Not only are the principles of private international law which are relevant far from clear and sometimes highly controversial, but the determination of the "law of the nationality" is, for factual as well as legal reasons, usually difficult and sometimes impossible. Dr. Murad Ferid has, within the limits drawn by the nature of his task, succeeded in bringing a measure of order into chaos. His juristic deductions are clear and often convincing, and his collection of material on the legislation of the states of Central and Eastern Europe is invaluable. In spite of the formidable nature of the problems he undertook to solve, Dr. Ferid has remained a firm believer in the nationality principle, but in this respect he has failed to convince the present reviewer. To the reviewer it appears that *malgré lui* the author has *de lege ferenda* made an almost unanswerable case against the nationality principle as a workable test for the solution of conflicts problems in the 20th Century. In times of a growing tendency towards national codification, of stability of frontiers and of populations, the test of citizenship had its merits, but today the link between a person and a legal system constituted by the fact of nationality has become tenuous, and, as Dr. Ferid's analysis of "interlocal" problems in Hungary, Yugoslavia, Roumania, etc., demonstrates, the application of the test is more likely than not to lead to an impasse. A great deal can be said against the English domicil concept in the form in which it was developed by the courts in the course of the 19th Century, and many lawyers may feel that in this respect the United States are ahead of this country, but even the English domicil test, with all its shortcomings, is, in the reviewer's opinion, preferable to the maze of problems to which the citizenship test gives rise in a critical situation such as that analysed by the author. The book deals only with the "general principles." A second part which has not yet been published is intended to deal with the application of these principles to the law of contract and property, and, above all, to family law and the law of succession. Throughout the book, Dr. Ferid writes in the sober language of the lawyer and the jurist, but it is impossible to read this work without being continuously aware of the heartrending facts which lie behind the author's cool reasoning. The book must be received with gratitude, but the facts which made its publication necessary and desirable, are a disgrace to our generation.

O. KAHN-FREUND.

THE ITALIAN CONSTITUTION

THIS¹ is a comprehensive discussion on comparative lines but with special reference to the present Italian Constitution of the following topics: the structure and operation of the modern democratic state, the legislative power and the executive power. The author shows himself generally very well informed on the characteristics of foreign constitutions, including that of this country and has a very good sense of the way in which such systems work; but the main importance of the book lies in its

¹ *Diritto Costituzionale (lo Stato Democratico Moderno)*. By P. Biscaretti di Ruffia. (Casa Editrice Dott. Eugenio Jovene, Napoli, 1949.) Vol. 1, pp. xx and 684. Lire 2,200 (in Napoli).

descriptions of Italian government at the present day. We look forward with anticipation to the appearance of the second volume of this second edition, for the matters it will contain are likely to be of even greater interest. They are the judicial power and constitutional and administrative jurisdiction, unions of states and regional local and colonial self-government, written constitutions and the enunciation of the rights and duties of citizens, and political parties.

F.H.L.

CONTRACT IN CONFLICT OF LAWS

THE author studies one of the most controversial problems in the field of conflict of laws relative to contractual obligations, viz. the relationship between the creation of the contract and the autonomy of the contracting parties. Are the parties allowed to choose the law not only insofar as it is to apply to the effects of their contract, but also with regard to its conclusion, its validity and the influence of mistake, fraud, coercion or other defects of consent?

In the first part of the work¹ the author examines the answers presented by the various legal systems, notably by the practice of the courts. The centre of his examination is Swiss law, which answers the question very differently from all other continental systems. The author has, however, studied with equal care the judicial solutions found in Germany, France, Italy, England and the United States. Swiss law, laid down in a great number of decisions of the Federal Court—the author has analysed 25 decisions—originally recognised the right of the contracting parties to determine the applicable law pertaining to the conclusion and validity of the contract as well as to its effects. This view was, however, abandoned in 1906, when the Federal Court for the first time declared a choice of law by the parties in so far “impossible” as it applies to the formation and validity of their contract. Since that decision the Federal Court has continuously rejected the autonomy of the parties in respect of formation and validity, and replaced it by the *lex loci contractus*. The other continental supreme courts have maintained the autonomy of the parties without such restriction. This is the case particularly in Germany, France and Italy.

The second part of the book under review is an investigation of the problem from the point of view of legal doctrine, and a critical study *de lege ferenda*. The author divides it into three chapters: the first, of interest mainly for the Swiss scholar, deals with the power of contracting parties to exclude from their contract the rules of the Swiss Code of Obligations (ss. 1-31) on the conclusion of the contract, its validity and the influence of mistake, fraud and coercion. The second chapter gives a careful review of the history of the problem (pp. 129-146). In the third chapter (pp. 129-146) the author deals with the “autonomy of the parties” generally, that is without restricting his study to the problem of conclusion and validity. He develops and criticises what he calls “the classical reaction” against the autonomy of the parties, which has arisen since the end of the 19th century, notably in French and German theory. He contrasts it with the “new doctrine,” as he calls it. This new doctrine takes as its starting point the old opinion on which the constant judicial practice (except in Switzerland) is based and according to which the law governing the effects of a contract covers also its formation, validity, and defects. But as the author believes that the old opinion contains a logical gap by naïvely connecting the contractual relationship with the intention of the parties without asking whence such power of the parties is derived, he attempts to fill in this gap, discovering in the *lex fori* the “foundation” for the parties’ autonomy. This is unassailable but of no great importance.

The next section (pp. 190-225) deals with the scope of the parties’ autonomy. The author distinguishes between “national” and “international” facts and allows the autonomy of the parties only in the case of international facts. An undoubtedly correct statement. But he regards as “international” solely such facts as have a legal, not merely an economic relationship to more than one country; a rather narrow view. On the other hand, the author’s contention is that *if* the facts are international (in this sense), that is, if there is a strong legal relationship to two or more legal systems, the parties are allowed to choose not only one of these legal

¹ Rudolf Moser (Rechtsanwalt in Zürich, Privatdozent St. Gallen). *Vertragsabschluss, Vertragsgültigkeit und Parteiville im internationalen Obligationenrecht*. (St. Gallen, 1948.) Pp. xviii, 253. Fr. 22.50.

systems but *any system* even if it has no relationship to the facts (p. 200). Admittedly this opinion is to be found in France, though restricted to international money obligations, and some French writers adhere to it without restriction; but in England, the United States, and Germany it seems to have no followers.

Though such extension of the parties' autonomy is not desirable from the point of view of practice, the reviewer agrees with the author's contention that the autonomy of the parties covers both the effects and the conclusion of the contract.

In the last chapter the author discusses the question whether the agreement of the parties on the applicable law is itself a contract, and if so, whether it is part of the principal contract, and whether it can be separated from it. He answers all these questions affirmatively, and the reviewer agrees with him.

Dr. Moser's book is helpful and valuable. One might object that it sometimes goes beyond its proper scope, inasmuch as the author touches on all the problems connected with the autonomy of the parties. But if such irregular explanations are well done—and in this case they are—there is no ground for complaint. The style of the book is precise and restrained. The author's knowledge of the relevant literature and of the decisions of the courts is extensive, though not exhaustive. Notably the famous decision of the Judicial Committee of the Privy Council in the case of *Vita Food Products v. Unus Shipping Co.* ([1939] A.C. 277), although ten years old and discussed over and over again, has been overlooked. It would be interesting to learn the author's attitude to this most important of all British decisions.

M.W.

SOVIET LAW

THIS is a mimeographed collection¹ of source material, consisting of extracts from codes and statutes, reports of cases and passages from juristic and political literature, and aiming at giving a picture of characteristic features of Soviet law and of the way in which problems are handled under it. Everything is given in English translation, and accordingly, English versions of Russian legal material being very rare, the collection would in any case be very valuable and instructive to the English or American lawyer. As Professor Hazard says in his preface, "As with all courses in comparative law, the materials are not intended to provide the means of becoming skilled in the detailed aspects of law in the country being studied. The purpose is to awaken appreciation in the student of the fact that law is a social science and that there are various ways of meeting the issues with which the student has become familiar in his study of American law." Thus the book contains only 132 pages, and is of course only a series of sketches. Yet it is surprising how much can be done in this way. I felt after no very prolonged study that I had a real picture of Soviet law and legal methods—so well had the materials been selected. It is as though one had before one the few significant strokes of a Phil May cartoon. I can do little to check the soundness and validity of the picture given, but the editor's reputation is a sufficient guarantee. I shall certainly use the collection in seminars on civil responsibility, a topic where Soviet law is by no means too remote from Western law to make comparison fruitful.

Although the book starts with considerations of legal theory, the judicial system, protection of the state and society and types of crime, and later deals with such topics as protection of the individual against public administrators and public ownership, it is mainly concerned with private law, in so far as under a system like the Soviet one can distinguish it from public law. But the editor does not content himself with discussion of property, contracts, torts and family law; he also devotes much attention to labour relations, patents and copyright, housing, and restrictions on deprivation of property rights. The book ends with an excellent selected bibliography of books in English. It dates from 1947.

In its present form the book can have only a very limited circulation, and indeed I owe my copy to the kindness of Professor Hazard himself. It is only a tool he has used in teaching law school students and students in an area study course devoted to the U.S.S.R. One can only hope that if he brings it up to date he will have it printed and bound in such a form as to enable it to be sold in the open market on both sides of the Atlantic.

F. H. LAWSON.

¹ *Materials on Soviet Law*. By John N. Hazard, Professor of Public Law. Columbia University.

ITALIAN NAVIGATION CODE

THIS is a commentary¹ on the 14 preliminary articles of the Italian Navigation Code of 1942. These deal first with the sources of the law of navigation, including aviation; secondly with the territorial area covered by state sovereignty; thirdly and notably with the conflict of laws in respect of navigation and aviation. The initial plan of publishing a commentary on the whole of the Navigation Code had to be dropped in consequence of the war. Udina's work on a small part of the code is all the more welcome.

The book contains a thoughtful interpretation of such rules of private international law as are concerned with navigation; the general rules of private international law are not explained even where they are applicable to navigational matters.

The conflict rules of the Italian Navigation Code are remarkable. The most important point of contact in nearly all incidents of navigation law is the "national" law of the vessel or aeroplane concerned. This law regulates the consequences of acts done or other events happening on board the vessel or aeroplane. It decides questions of ownership and other real rights of vessels and aeroplanes. It determines the responsibility of the ship-owner and the rights and duties of the master. It applies as optional law (*ius dispositivum*) to most types of contracts; only labour contracts with seamen are compulsorily governed by Italian law if the vessel or aeroplane is of Italian nationality. The national law of the ship regulates the contribution to general average. In the case of salvage on the high seas the duties arising out of such help are determined by the national law of the succouring vessel or aeroplane. Obligations created by collision on the high seas are governed by the national law of both ships if the law is the same for both; if it is not, Italian law applies, probably *lex fori*.

To each of these rules the author supplies helpful comment, and everywhere he compares the Italian solution with those to be found in other countries.

GREEK AND ITALIAN CODES

IN this little study² Professor Udina, the well-known author of a valuable textbook on Private International Law, compares the conflict rules of Greece as proposed by the draft of 1936 with the Italian conflict rules as developed in the *Progetto definitivo* of 1936. The study remains of considerable interest despite the fact that the drafts have been replaced respectively by the Greek civil code of 1940 and the Italian civil code of 1942, both of which, particularly the former, wrought substantial changes.

AMERICAN CRIMINOLOGY

WHILE a comparative study of criminal law is still in its beginnings, criminology is well on its way to develop into an international science. Between the two wars American criminologists took the lead. The methods and results of their comprehensive research schemes and the amount of knowledge displayed in numerous textbooks have influenced every student in this field. An encyclopædia is an opportunity for stocktaking, for presenting a cross-section of recent studies, and for a plain statement of what we really know today. The editors of this new encyclopædia³ must be congratulated on the successful accomplishment of these objects. A vast amount of information has been condensed into one volume. Criminology is a composite subject, a border-line field of law, politics, sociology, medicine, psychology and education, and the reader expects information in all of these topics. The editors' selection of articles is unorthodox, imaginative, and yet well balanced. Beside the standard questions of causes of crime, types of criminals, probation, parole, and very detailed aspects of imprisonment, there are psychological contributions on adolescence and maturation (Zachry, Doll), mental mechanism (Hinsie), frustration and aggression (Mowrer), mental tests (Kutash), and psychological therapy (Lindner, Zilboorg). We learn about recent American developments in Behaviour Clinics (Bronner, Selling) and the Youth Correction Authority (Desmond). The article on Sentencing Behaviour of the Judge (Gaudet) illustrates the "realistic" outlook of American jurisprudence. Many of the best known criminologists write brief accounts of the results of their particular studies; Monachesi (Prediction of Criminal Behaviour), Oberholser (Psychiatry and the Law), Reckless (Penology and

¹ Manlio Udina, *Le Disposizioni preliminari del Codice della Navigazione*, Trieste, 1942. 68 pp. 18 lire.

² Manlio Udina, *Sulle Norme di Diritto Internazionale Privato del Progetto di Codice Civile Greco*, Trieste, 1939, 9 pp. 4 lire.

³ *Encyclopædia of Criminology*. Edited by Vernon C. Branham and Samuel B. Kutash. (New York Philosophical Library, 1949.) XXXVII+527 pp. \$12.

Correction), Sutherland (White Collar Crime), Teeters (World Penal Systems), to mention only a few. Professor and Mrs. Glueck contribute a stimulating introduction to the aims and methods of follow-up studies, a topical subject in view of present research plans in this country. What is even more impressive is the wide range of more than sixty authors, which shows how far an intense study of criminology has spread among American Universities. This book professedly represents only the American criminology of today, but incidentally includes more about the experience of other countries than the pre-war German *Handwörterbuch der Kriminologie*. However, the brief notes on substantive criminal law are more or less confined to the statutory law of New York. The next target should be a truly international encyclopædia, and for any such project the present work has set a valuable precedent and a high standard of scholarship.

M.G.

THE LAW AND CUSTOM OF THE SEA

THE primary purpose of this book¹ is to instruct officers of the Royal and Merchant Navies in the principles of International Law, a task for which Professor Smith is particularly suited, having for several years lectured at the Royal Naval War College and the Royal Naval Staff College. Nevertheless it is to be hoped that this modest work will not escape the attention of lawyers and legal students, as it states succinctly and in an interesting way most of the legal problems to which the sea gives rise in International Law. There is a minimum of footnotes and references to authorities, but different views on such problems as the extent and nature of territorial waters are set out at length, and a number of leading cases such as *The Behring Sea Controversy* and *The Lotus* are well summarized.

Professor Smith devotes rather less than one-third of his book to the Law of Peace, dealing in turn with internal waters, territorial waters and the high seas. It would perhaps add to the value of the book, especially from the point of view of the naval officer, for whom it is intended, if this section included a short description of the main bays, straits and other waters, which are governed by special rules laid down either by international custom or by particular convention. The references on pages 21 and 22, to the Suez, Panama and Kiel Canals, to the Danish Sound, to the Dardanelles and the Straits of Magellan, are tantalisingly brief.

The treatment of the Law of War is less satisfactory, although mainly because of the unsatisfactory state of the law itself. As Professor Smith says, "In dealing with the laws of war it is no longer possible for any private writer to state rules with any confidence that they will be observed when war breaks out." Whether the traditional rules relating to contraband, blockade and unneutral service will have more than historical interest in the future will depend on the relative strength of the belligerents and the neutrals. Of considerable historic interest, however, is Professor Smith's detailed account on the genesis and fate of the Declaration of London, 1909. Agreement on the Declaration was reached by ten leading naval powers, but the Declaration although accepted by the House of Commons was rejected by the House of Lords. Professor Smith rather paradoxically welcomes the freedom which rejection of the Declaration gave the British Government in World Wars I and II, while at the same time he considers that the Declaration was a substantially accurate statement of the law as agreed in 1914.

The chief interest of Professor Smith's book to the lawyer is in the first section of the Law of Peace, which being intended for the practical purposes of naval officers lays refreshing emphasis on International Law as a working system in the modern world. A more academic approach might easily strengthen the scepticism to which, from time to time, all students of International Law must be subject. For this reason Professor Smith's book is to be specially recommended to teachers of International Law, who find it difficult to convince their pupils that International Law is a living system of law and not mere academic speculation.

N. S. MARSH.

THE GOVERNMENT OF CANADA

STUDENTS of federal constitutional law are generally hampered by the absence of good contemporary studies of the constitutions with which they are concerned. This

¹ *The Law and Custom of the Sea*. By H. A. Smith, D.C.L. (Oxon), Professor Emeritus of International Law in the University of London. (London: Stevens & Sons Ltd., 1948.) P. 193. Price 12s. 6d.

is not altogether surprising, for the preparation of such works is often a thankless task. New judicial interpretations—and federal constitutional law rests heavily upon the judges—have an awkward habit of making the conclusions or prognoses on the printed page look uncommonly silly. The result is that few will venture upon such shifting sands.

Professor Dawson's book¹ is much more than a study of the constitutional law of the Canadian federation. He does review briefly the interpretation of the British North America Act by the Judicial Committee of the Privy Council, but this occupies only a small part of his book. He is concerned rather with the institutions of Canadian government. A glance at his table of contents shows how far afield his studies range. He commences with a brief survey of the history of Canadian political institutions culminating in the enactment of the British North America Act and the subsequent achievement of Dominion states. He then proceeds to an examination of the constitution and its interpretation.

This part is of particular interest to lawyers. Professor Dawson endorses the criticism made by many distinguished Canadian lawyers that the decisions of the Privy Council in cases concerned with Dominion and Provincial powers have largely nullified the intentions of the framers of the original compact. The stress on Provincial powers which has generally reflected the Judicial Committee's approach, has made it more difficult to achieve that measure of central direction which, in Professor Dawson's and this reviewer's opinion, present conditions have made desirable, if not necessary. At the same time, it is interesting to note the author's comment, as an observer of the Canadian scene, that the Judicial Committee's views reflect a large measure of popular sentiment in Canada. That is to say, there is a strong belief in the importance of maintaining strong and independent Provincial institutions. However, Professor Dawson supports the abolition of the appeal to the Privy Council. As he puts it: "It is becoming more and more obvious that the risk of an occasional prejudice is far preferable to an objectivity which is founded on an Olympian remoteness from the scene of action; that the Judicial Committee has known little about the nature and problems of Canadian federation." At the present moment, Professor Dawson's views are reported to be receiving the endorsement of the Canadian legislature.

Professor Dawson draws attention to many interesting phrases and problems of federal government in Canada. There is the perennial problem of Dominion-Provincial financial relations. The author is anxious to see a solution of this problem which will ensure adequate resources to the Provinces, but which will not undermine their independence. This is, perhaps, the most difficult problem to be faced in a federal structure. It is interesting to note, too, how Canadian Cabinets must be constructed with an eye to representation from the various Provinces. The advice to the young hopeful in politics is to cast his eye in the direction of Prince Edward Island!

Professor Dawson touches on many diverse points. It is interesting to note that he would like to see a Bill of Rights written into the Canadian constitution. He devotes space to a discussion of proposals to provide an amendment process which will relieve Canada of the necessity of resort to the United Kingdom Parliament for this purpose. He also expresses concern at the growth of a considerable field of administrative activity in Canada, and is anxious to ensure that any growth of administrative law will be reflected in the establishment of independent tribunals which will safeguard the rights of those who appear before them.

The book is attractively written and contains many amusing passages. The author recalls a period when the Governor-Generalship was an office which Queen Victoria felt would provide "a distinction for Lorne," her son-in-law, and "a fine independent position for dear Louise." As Professor Dawson remarks "it is difficult . . . to avoid the feeling that the emphasis was somewhat misplaced."

Professor Dawson has done a great service to students of the political institutions of Canada in producing this admirable book. Students of Canadian constitutional law will of course, seek more detailed information, but as has already been noted, the book does not profess to be a treatise on constitutional law. However, it is of inestimable value to have such a survey of Canadian institutions from one who is uniquely in a position to provide it.

ZELMAN COWEN.

¹ *The Government of Canada*. By R. MacGregor Dawson (University of Toronto Press, 1947.) Pp. x, 602. \$5.50 or 80s.

TORTS IN QUEBEC.

I HAVE not yet had time to read this book¹ well enough to warrant a full review. For the moment a short note must suffice, but I hope next year to make the book the basis for an article on the Law of Torts in the Province of Quebec. However, it is an excellent book which merits attention not only from comparative lawyers, but also from practicing English lawyers, for although Quebec lawyers practise carefully their doctrine that the French and English parts of their law should not become confused, and that in the French parts English cases and opinions should be cited only as persuasive authority, it is quite clear that even the Law of Torts, which is predominantly French in origin, has been profoundly influenced by English law. This is very obvious in the Law of Defamation, where the civil law has been greatly affected by the criminal law, which throughout Canada is derived from England. Further, although the author constantly cites French jurists and of course writes in French, his book has in many ways a very English look. Thus his footnotes are full of citations of cases by the names of the litigants, a practice which is hardly ever used in France. Incidentally he uses the symbol *v.* instead of *C.* to represent the word "against." Then again he cites the actual words of judgments, attributing them by name to the judges who delivered them, again a very English and un-French practice, for it is hardly conceivable except in Courts where judges try cases singly at first instance. These may seem trifling points, but I think any English lawyer will feel instinctively that he is reading a book which, though written in a foreign language, shows a type of thought similar to his own. In other words, the Quebec Law of Torts, as applied and discussed, is very much of a middle term between French and English law, even where neither law has exercised any definite influence on the other. In a rapid process of sampling, I have found exceptionally interesting the discussions of the Responsibility of the Crown, the Liability for Motor Accidents (which is based on a rather complicated statutory foundation), Nuisance and Contributory Negligence. It is interesting to note that only so late as 1899 did Quebec definitely reject the English doctrine based on Causation for the French practice of reducing damages where the plaintiff's negligence has contributed to the accident. Some of the most important Quebec cases, such as *Fréchette's case*, have got into the English reports and textbooks, but it seems that more use might be made by English practitioners of the experience which Quebec lawyers have amassed in the handling of contributory negligence in the past fifty years.

F.H.L.

The following publications have also been received:—²

- American Liberties. *In the Shadow of Fear*. 1948-49. 29th Annual Report. (N.Y. American Civil Liberties Union, 1949.) Pp. 88.
- Annals of Social Sciences*. (Lublin Catholic University, 1949.) Pp. xvi, 424.
- Annual Digest and Reports of Public International Law Cases*, 1943-1945. (London: Butterworth & Co., 1949.) Pp. xxxii, 484. £2 15s.
- Arminjon, P. *Precis de Droit International Prive Commercial*. (Paris: Librairie Dalloz, 1948.) Pp. 620. 900 Frs.
- Boletin Informativo—Facultad de Derecho Y Ciencias Sociales*, Ano 1, Nos. 1, 2 & 3. (Buenos Aires, 1948.) Pp. 173.
- Annual Summary of Laws and Regulations relating to the Control of Narcotic Drugs*, 1947. (N.Y.: United Nations, 1948.) Pp. xii, 40.
- Canada, Statutes*, 1949. 13 Geo. VI, Vol. 1. (Ottawa: Edmond Cloutier, 1949.) Pp. viii, 148, 83.
- Christophides, Michel. *Critique Politico—Juridique de la Charte des Nations Unies*. (Cairo: Imprimerie National, 1949.) Pp. 391-626. P.T. 40.
- Colbert, Evelyn Speyer. *Retaliation in International Law*. (London: King's Crown Press, Geoffrey Cumberlege, 1948.) Pp. ix, 228. 16s.
- Colombos, C. J. *Law of Prize*. (London: Longmans Green, 1949.) Pp. xiii, 421. £1 10s.
- Current Legal Problems*. Edited by G. W. Keeton & G. Schwarzenberger. (London: Stevens & Sons, 1949.) Pp. ix, 288. £1 1s.
- Eder, Phanor J. *Ciertos Principios Caracteristicos del Common Law*. (Cuba:

¹ *Traité de Droit Civil du Québec*, Vol. VIII, La Responsabilité Civile Délictuelle et Quasi-Délictuelle. By André Nadeau. (Montreal, Wilson et Lafleur, 1949.)

² Mention here does not preclude review later.

- Academia Interamericana de Derecho Comparado E. Internacional, 1948.) Pp. 257-452.
- Egbert, Lawrence Deems. *Law Dictionary*. English, Espanol, Français, Deutsch. (N.Y.: Falcon Publications, 1949.) £7 10s. (Can be obtained from Sweet & Maxwell Ltd.)
- Etudes et Documents* (Conseil D'Etat) No. 2. (Paris: Imprimerie Nationale, 1948.) Pp. 10.
- Fifoot, C. H. S. *History and Sources of the Common Law*. (London: Stevens & Sons, 1949.) Pp. xvii, 446. £2 5s.
- Galeotti, Serio. *La Posizione Costituzionale del Presidente della Repubblica*. (Milan: Ufficio Editoriale della Università Cattolica, 1949.) Pp. vi, 55.
- German Major War Criminals, Trial*. Pt. 18 July 2, 1946 to July 15, 1946. Pp. xiv, 401, 7s., Pt. 19 July 16, 1946 to July 27, 1946. Pp. x, 482. 8s. (London: H.M. Stationery Office, 1948 and 1949.)
- Gibraltar, Laws for 1947*. (Gibraltar: Government Printer, 1948.) Pp. xvi, 303. £1.
- Goodrich, L. M. & Hambro, E. *The Charter of the United Nations*. (London: Stevens & Sons, 1949.) Pp. xvi, 710. £1 5s.
- Graber, Doris Appel. *The Development of the Law of Belligerent Occupation, 1863-1914*. (Columbia University Press, Geoffrey Cumberlege, 1949.) Pp. 343. £1 2s.
- Graveson, R. H. *The Spirit of English Law*. (Reprinted from *Juridical Review*, August, 1948.) Pp. 23.
- Gottschalk, R. *The Devil Knoweth Not*. (London: Stevens & Sons, 1948.) Pp. viii, 111. 7s. 6d.
- Fry, Thomas Penberthy. *The International and National Conference of Australian Parliaments to Legislate in Respect of Extra-Territorial Crime*. (University of Queensland, 1947.) Pp. 90. 10s. 6d.
- Head, C. B. V. *Essentials of Magisterial Law*. (London: Winchester Publications, 1949.) Pp. xxii, 543. £1 15s.
- History of the United Nations War Crimes Commission*. (London: H.M. Stationery Office, 1948.) Pp. xx, 592. £1 10s.
- International Tax Agreements*. (N.Y.: United Nations, 1948.) Pp. viii, 461. £1.
- International Legislation*, Vol. VIII, 1938-1941. Edited by Manley O. Hudson. (Washington: Carnegie Endowment, 1949.) Pp. xlviii, 653. \$4.00.
- Jewish Year Book of International Law*, 1948. (Jerusalem: Rubin Mass, 1949.) Pp. xv, 304. \$8.00.
- Jus Gentium*, Vol. I. (Copenhagen: Einar Munksgaard, 1949.) 25 Danish kroner per year.
- Labour Courts in Latin America*. (Geneva: I. L. O., 1949.) Pp. v, 110. 3s. 9d.
- Law Reports of Trials of War Criminals*, Vol. V, Pp. ix, 101. 5s. Vol. VI, Pp. vii, 120. 5s. Vol. VII, Pp. xi, 97. 5s. Vol. VIII, Pp. xi, 92. 5s. Vol. IX, Pp. x 94. 5s. Vol. X, Pp. ix, 181. 5s. Vol. XI, Pp. x, 110. 5s. Vol. XII, Pp. viii, 127. 5s. Vol. XIII, Pp. xi, 152. 5s. Vol. XIV, Pp. xii, 160. 5s. Vol. XV, Pp. xvii, 218. 5s. (London: H.M. Stationery Office, 1949.)
- Leeward Islands, Acts and Ordinances*, 1947. (Antigua: Government Printing Office, 1948.) 5s. 6d.
- Local and Personal Acts of 1948 and the Statutory Orders of 1948. Title, Contents, Tables and Short Titles and Index*, (London: H.M. Stationery Office, 1949.) Pp. 70. 2s. 6d.
- Luchaire, Francois. *Manuel de Droit d'outre-mer*. (Paris: Recueil Sirey, 1949.) Pp. 574. 800 Frs.
- Martin, James V., Jr. *A History of the Diplomatic Relations between Siam and the U.S.A., 1833-1929*. (Abstract of Thesis presented to the Faculty of the Fletcher School of Law and Diplomacy, 1947. Thesis Abstract, 1947, No. 2.)
- Menezes, Geraldo Bezerra de. *Dissídios Coletivos do Trabalho*. (Brazil: Rio de Janeiro, 1949.) Pp. 47.
- Mezger Ernst, y Maury, Jacques. *Matrimonios Espanoles ante Tribunales Franceses*. (Madrid: Instituto de Estudios Politicos.) Pp. 59. 12 pesetas.
- Murdock, J. O., Knauth, A. W. & Thayer, P. W. *Law and Lawyers for one World in the Making*. (Reprint from *George Washington Law Review*, December, 1948.) Pp. 14.
- New Zealand Statutes*, 1947. (N.Z.: Government Printer, 1948.) Pp. xxix, 860.
- Nigeria Legislative Debates*, Second Session. (Lagos: Government Printer, 1948.)

- Pp. 271. 1s. 6d. Vols. I and 2 (Lagos: Government Printer, 1949.) Pp. 808, xi, xiv, 1s. 6d.
- Nuffield Foundation*, Fourth Report. (Oxford University Press, 1949.) Pp. 127.
- Nuremberg Tribunal, Charter and Judgment*. (U.N. General Assembly, 1949.) Pp. v, 99. 3s. 9d.
- Oppenheim's International Law*, Vol. I. Peace. Seventh Edition. Edited by H. Lauterpacht. (London: Longmans Green & Co., 1948.) Pp. liii, 940. £3 10s.
- Perkins, Whitney Trow. *American Policy in the Government of its Dependent Areas*. (Thesis Abstract, 1948, No. 1. Fletcher School of Law. August, 1948.)
- Platna soustava primych dani*. (Prague: Kniznice Ministerstva Pri Sjednoceni Zankia, 1948.) Pp. 250.
- Plucknett, T. F. T. *Legislation of Edward I*. (Oxford University Press: Geoffrey Cumberlege, 1949.) Pp. xv, 168. 15s.
- Pollit, Basil H. *Defeat of Justice*. (Reprint, *Florida Law Journal*, April, 1949.) Pp. 14.
- Preparatory Study Concerning a draft Declaration on the Rights and Duties of States*. (U.N. Can be obtained from H.M. Stationery Office.) Pp. vi, 228. 7s. 6d.
- Renner, Karl. *The Institutions of Private Law and Their Social Functions*. (London: Routledge & Kegan Paul Ltd., 1949.) Pp. viii, 307. £1 5s.
- Reports of International Arbitral Awards*, Vol. I. Pp. 614. £1 10s. Vol. II, Pp. 617-1,369. (U.N.: H.M. Stationery Office, 1949.) £1 15s.
- Revista de la Escuela Nacional de Jurisprudencia*. Universidad Nacional Autonoma de Mexico. Vol. X, No. 38-40 and Vol. XI, No. 41, 1948 and 1949.
- The present reviewer has to admit that he finds it always a particular pleasure to receive the statelty issues of this Mexican legal periodical. Most legal periodicals which a comparative lawyer has to peruse, must of necessity contain a lot of material which, though valuable as such, is to him just dead wood. There is hardly any of this in this Review. The strictness with which the editors confine themselves to legal philosophy, legal history, jurisprudence and comparative law makes every issue interesting to non-Mexican readers. The four issues to be reviewed here contain well over 800 pages. It is impossible within the scope of this brief announcement to deal adequately with the wealth of interesting writing contained in these volumes. The present writer found Professor Alcala-Zamora's article on the success of Spanish conceptions and institutions in the field of procedure and Senor Gonzalez Uribe's essay on the Justification of the State particularly stimulating, but others will naturally prefer other contributions. A review by a Spanish writer, now residing in Mexico of a work by an Italian scholar, now living in the Argentine, on a topic German legal history may be noted as evidence of the possibilities of international co-operation in the field of law. Among non-Mexican contributions to these volumes the reader will notice with interest a reprint of Professor Schick's critical essay on the Nuremberg judgment and a valuable study on some principles of medieval criminal procedure from the pen of Dr. W. Ullmann.
- E. J. COHN.
- Revista de la Facultad de Derecho de Madrid*. After a lapse of time this periodical appeared again in 1948. In addition to a number of articles of very wide range, it contains a digest—over a hundred pages in length—of the most important civil cases decided in the four years from 1944 to 1947.
- Riezler, Erwin. *Internationales Zivilprozessrecht*. (Berlin: Walter de Gruyter & Co., 1949.) Pp. viii, 710. 30 D.M.
- Rosenthal, Eric. *South African Diplomats Abroad*. (South African Institute of International Affairs, 1949.) Pp. 32. 1s. 9d.
- Russell on Arbitration*, 14th Edition. Edited by Ernest Wetton. (London: Stevens & Sons, 1949.) Pp. li, 537. £3 10s.
- Saskatchewan Statutes*, 1949. (Regina: King's Printer, 1949.) Pp. vi, 801, lxx. \$3.00
- Scott, Sir Harold. *Police Problems of Today*—Third Annual Lecture in Criminal Science delivered at Cambridge. (London: Stevens & Sons, 1949.) Pp. 23. 2s. 6d.
- Schönke, Adolf. *Zwangsvollstreckungsrecht*. Fifth Unrevised Edition. (Karlsruhe: C. F. Müller, 1948.) Pp. x, 279. R.M. 9.
- Schönke, Adolf. *Zivilprozessrecht*. Fourth Unrevised Edition. (Karlsruhe: C. F. Müller, 1948.) Pp. xiii, 443. R.M. 16.

- Schwarzenberger, G. *International Law*, Second Edition, Vol. I. (London: Stevens & Sons, 1949.) Pp. liv, 681. £3 3s.
- Smith, H. A. *The Law and Custom of the Sea*. (London: Stevens & Sons, 1948.) Pp. x, 193. 12s. 6d.
- Sierra Leone. *Laws*. 1946. Vols. I, II, III. *Rules and Orders, Misc. Orders and Acts of U.K. Parliament, and Index to Vols. III and IV*. (London: C. F. Roworth Ltd., 1946.) £10 10s. a set.
- South Australian Industrial Reports, 1947, Vol. XXI. (Adelaide: Government Printer, 1949.) Pp. vii, 360.

This volume continues the series which has been published since the establishment of the Court. An interesting case is an application for the reduction of a 44-hour week to 40 hours, so that the State Legislation may correspond with the decision of the Commonwealth Arbitration Court. No decision was reached, and it was left to the parties concerned in 29 occupations to take further appropriate action.

- Survey of Legal Periodicals held in British Libraries*, Publication No. 1 (London: Institute of Advanced Legal Studies, 1949.) Pp. vii, 52. 7s. (Paper covers 5s.)
- Svatuska, Dr. Ladislav. *Průruka právní dokumtace*. (Prague: Kniznice Ministerstva, 1948.) Pp. 60. Cena kës 150.
- Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1949*. (N.Y.: United Nations, 1949.) Pp. ix, 1,201. £2 10s.
- Tedeschi, Guido. *L'Impossibilit  della Prestazione nel Diritto Inglese*. (Rome: Italian Institute of Legislative Studies, 1946.) Pp. 42.
- Tedeschi, Guido. *Concorrenza cletiva di leggi diverse*. (Rome: Italian Institute of Legislative Studies, 1947.) Pp. 47.
- Tenekidis, Georges. *La Vie Juridique en Grece dans les Publications Parnes de 1945 a 1947*. (Extract du *Bulletin Analytique de Bibliographie Hellenique*, 1947.)
- Tompkins, Pauline. *American-Russian Relations in the Far East, 1914-1933*. (Thesis Abstract 1947 No. 1. Fletcher School of Law.) Pp. 7.
- Treaty Series*. Vol. 9, 1947. Pp. xiii, 413. 18s. 9d. Vol. 10, 1947. Pp. xi, 376. 18s. 9d. (U.N.: H. M. Stationery Office, 1949.)
- Uganda, *Ordinances and Subsidiary Legislation*, 1948. (Uganda: Government Printer, 1949.) Pp. 377. 5s.
- Uniformity of Legislation in Canada*, an Outline and Rules of Drafting. (Conference of Commissioners on Uniformity of Legislation in Canada, 1949.) Pp. 41.
- United Nations Documents*, Check List. Part 4, No. 1. Pp. xxi, 59. 7s. 6d. Part 4, No. 2. Pp. xiii, 39. 5s. Part 5, No. 1. Pp. lii, 230. £1 5s. Part 6H, No. 1. Pp. viii, 11. 2s. 6d. (U.N.: H.M. Stationery Office, 1949.)
- Ways and Means of Making the Evidence of Customary International Law More Readily Available*. (U.N.: H.M. Stationery Office, 1949.) Pp. vi, 114. 3s. 9d.
- Wengler, Wilhelm. *Das neue Britische Staatsang ngigkeitsrecht*. (Reprint from *Archiv des  ffentlichen Rechts*, 1949.) Pp. 26-55.
- White, T. A. Blanco. An Index to the *Law Quarterly Review*, Vol. 1-64. (London: Stevens & Sons, 1949.) Pp. xv, 286. £1 5s.

Mr. T. A. Blanco White and the publishers have done the profession a great service in producing a comprehensive Index to the *Law Quarterly Review*, Volumes 1-64, and gratitude should also go out to Professor Goodhart, who prompted the undertaking, and to Mr. R. E. Megarry, who settled the scheme on which it should be made. The Index is in three parts, an index of subjects, a list of contributors of articles, and a table of cases. Only prolonged use could check the completeness of the index of subjects, but a mere dip convinces one of the extraordinary range of material, and, incidentally, of the range of interest always shown by successive editors of the review. One is tempted to see which contributor wins the race. At first sight there is a dead-heat between Pollock and Holdsworth with 42 entries apiece, but Pollock wins with a share in another article. It is perhaps appropriate that he should prevail in what is perhaps the greatest of all his contributions to the science of law, the premier legal journal of the English-speaking world.

Villcock, H. D. *Mass Observation*. Report on Juvenile Delinquency. (London: The Falcon Press Ltd., 1949.) Pp. 132. 7s. 6d.

Villis, John W. *"Mixed Accommodations" under Rent Control Laws*. (Reprinted from *The Missouri Law Review*, Vol. 13, No. 3, July, 1948.)

Villiams, O. Cyprian. *History of Private Bill Procedure and Standing Orders in*

- the House of Commons*, Vol. 1. (London: H.M. Stationery Office, 1948.) Pp. x, 340. 17s. 6d.
- Woolf, Ernst. *Vorkriegsverträge in Friedensverträgen*. (Berlin: Walter de Gruyter, 1949.) Pp. xii, 196. D.M. 8.80.
- World in Focus*, Vol. 4, Nos. 1 and 2, 3 and 4, 5 and 6. Vol. 4, Nos. 7 and 8 (1949.) (Chicago: Library of International Relations, 1948-9.) \$5.00 per year.
- World Affairs*, Vol. 3, No. 1. (London: Stevens & Sons, 1949.) Pp. 112. 2s. 6d.
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